153 U.S. 446

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1051.

THE EAGLE INSURANCE COMPANY OF CINCINNATI AND JOHN K. GREEN, PRESIDENT, AND SAMUEL P. POST, SECRETARY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF OHIO EX REL. W. H. KINDER, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED OCTOBER 26, 1893.

(15,435.)

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INDEX.

	Original.	Print.
Assignment of errors	1	1
Writ of error	3	1
Citation	6	2
Bond	8	3
Docket entries	10	4
Judgment	10	5
Clerk's certificate and return	11	5
Certificate of Federal question	12	6
Exhibit A—Opinion	13	6
Stipulation for addition to record	23	18
Petition for writ of mandamus	24	19
Alternative writ of mandamus	27	20
Exhibit A—Petition for writ	29	21
Appearance for defendants	31	23
Answer	32	23
Demurrer to answer	37	26
Clerk's certificate	38	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1894.

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1 Supreme Court of the United States

THE EAGLE INSURANCE COMPANY OF CINCINNATI and JOHN K. GREEN and SAMUEL P. POST, President and Secretary of the Eagle Insurance Company, Appellants,
vs.
THE STATE OF OHIO on the Relation of W. H. KINDER, Superintendent of Insurance, Appellee.
} Assignment of Errors.

This day came the appellants, The Eagle Insurance Company of Cincinnati, John K. Green and Samuel P. Post, president and secretary of the Eagle Insurance Company, and say that in the record and proceedings in cause No. 3518, pending in the supreme court of Ohio, wherein The State of Ohio on the relation of W. H. Kinder, superintendent of insurance, was plaintiff and The Eagle Insurance Company of Cincinnati and John K. Green and Samuel P. Post, president and secretary of the Eagle Insurance Company, were defendants, there is manifest error in this, to wit, said supreme court of Ohio erred in sustaining the demurrer of the plaintiff to the first defense of the answer of the defendants and each of them and in entering judgment in favor of the plaintiff and in awarding the peremptory writ of mandamus against the defendants.

Wherefore the said The Eagle Insurance Company of Cincinnati, John K. Green and Samuel P. Post, president and secretary of the Eagle Insurance Company, pray that the judgment of the supreme court of Ohio be reversed, and that they be restored to all that they have lost by reason thereof.

JOHN F. FOLLETT,
THOMAS H. KELLEY,
Attorneys for Appellants.

2 [Endorsed:] # —. Supreme Court of the United States. The Eagle Insurance Co. *et al.*, appellants, *v.* The State of Ohio *ex rel.* W. H. Kinder, &c., appellee. Assignment of errors.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Ohio, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Ohio upon the relation of W. H. Kinder, superintendent of insurance of the State of Ohio, plaintiff, and The Eagle Insurance Company of Cincinnati and John K. Green and

Samuel P. Post, president and secretary of the said Eagle Insurance Company, defendants, and being a proceeding in mandamus wherein was drawn in question the validity of a statute of the State of Ohio, if intended to include the defendant company, and of the authority exercised thereunder, said statute being numbered as sections 3654 & 3655 of the Revised Statutes of the State of Ohio, on the ground that said statute is repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventeenth day of November, A. D. 1893, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eighteenth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROBT C. GEORGI, *Deputy.*

Allowed this 26th day of April, A. D. 1893, by—
J. P. BRADBURY,
Chief Justice of the Supreme Court of Ohio.

5 [Endorsed:] # 3518. Supreme court of Ohio. The State of Ohio *ex rel.* W. H. Kinder, sup't, &c., *v.* The Eagle Insurance Co. *et al.* Writ of error.

6 UNITED STATES OF AMERICA, *ss:*

To the State of Ohio *ex rel.* W. H. Kinder, superintendent of insurance, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, a copy of which is filed in the clerk's office of the supreme court of Ohio, wherein The Eagle Insurance Company of Cincinnati, John K. Green and Samuel P. Post, president and secretary of the Eagle Insurance Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against

the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Bradbury, chief justice of the supreme court of the State of Ohio, this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

J. P. BRADBURY,
Chief Justice of the State of Ohio.

7 On this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared Allen C. Taylor before me, the subscriber, a clerk of the supreme court of Ohio, and makes oath that he delivered a true copy of the within citation to Jno. K. Richards, attorney general of the State of Ohio.

ALLEN C. TAYLOR.

Sworn to and subscribed the 19 day of October, A. D. 1893.

[Seal of the Supreme Court of the State of Ohio.]

GEORGE H. KOLKER,
Deputy Clerk, Supreme Court Ohio.

8 Know all men by these presents that we, the Eagle Insurance Company of Cincinnati, principal, and John K. Green, as surety, are held and firmly bound unto the State of Ohio in the full and just sum of two hundred and fifty dollars, to be paid to the said The State of Ohio or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at Columbus, Ohio, in a suit pending in the supreme court of Ohio between The State of Ohio *ex rel.* W. H. Kinder, superintendent of insurance, and The Eagle Insurance Company *et al.*, a judgment was rendered against the said The Eagle Insurance Company, its president and secretary, and the said The Eagle Insurance Company *et al.* having obtained a writ of error and having filed a true copy thereof in the clerk's office of the supreme court of Ohio to reverse the said judgment in the aforesaid suit, and a citation having been directed to the said The State of Ohio, citing and admonishing it to be and appear at a term of the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Eagle Insurance Company *et al.* shall prosecute their said writ and proceedings in error to effect and answer all such costs as upon an affirmance of said judgment may be adjudged to the said The State of Ohio, respondent in error, if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) EAGLE INSURANCE CO.,
[SEAL.] By SAM'L P. POST, *Sec'y.*
JOHN K. GREEN.

Sealed and delivered in presence of—
T. H. KELLEY.
W. ARTHUR WOODLEY.

Approved this 30th day of June, A. D. 1893, by—
J. P. BRADBURY,
Chief Justice Supreme Court of Ohio.

9 [Endorsed:] #3518. Supreme court of Ohio. The State of Ohio *ex rel.*, &c., pl'ff, *v.* The Eagle Ins. Co. *et al.* Copy. Supersedeas bond for writ of error.

STATE OF OHIO, }
City of Columbus, } *ss:*

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the within is a true copy of the supersedeas bond for writ of error to the supreme court of Ohio in the case of The State of Ohio *ex rel.* W. H. Kinder, &c., *vs.* The Eagle Insurance Co. *et al.*, on file in my office.

In witness whereof I have hereunto set my hand and official seal this 19th day of October, A. D. 1893.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

10 *Transcript of Journal and Docket Entries.*

THE STATE OF OHIO, }
Franklin County, } *ss:*

Supreme Court of Ohio.

THE STATE OF OHIO *ex Rel.* W. H. KINDER, Superintendent of Insurance of the State of Ohio,
vs.
THE EAGLE INSURANCE COMPANY OF CINCINNATI and John K. Green and Samuel P. Post, President and Secretary of said Eagle Insurance Company. } No. 3518. Mandamus.

1893, March 14.—Petition filed.
" " " Alternative writ issued, returnable March 16th, A. D. 1893, at 9 o'clock a. m., directed to the sheriff of Hamilton county and taken by attorney general.

1883, March 16.—Alternative writ returned, endorsed: "Service of this writ is hereby acknowledged this 15th day of March, 1893. The Eagle Insurance Company, John K. Green, Samuel P. Post, by Follett & Kelley, their attorneys."
" " " Answer of defendants filed.
" " " Demurrer to answer filed.
" " 30.—Defendants' printed briefs on demurrer to answer filed.
" " " Plaintiff's printed briefs filed.
" " " Plaintiff's typewritten reply briefs filed.

And afterwards, to wit, at the January term, A. D. 1893, of the supreme court of the State of Ohio, on the second day of May, A. D. 1893, the following proceedings were had, to wit:

THE STATE OF OHIO *ex Rel.* W. H. KINDER, &c., *vs.* THE EAGLE INSURANCE COMPANY OF CINCINNATI *et al.* } Mandamus.

This cause, coming on to be heard on the demurrer of the plaintiff to the answer of the defendants and severally to the separate defenses set out therein, was argued by counsel and submitted to the court; whereupon the court, on consideration, find said demurrer to be well taken and do sustain the same; and the defendants and each of them not asking and failing to plead further, the court find upon the pleadings against the respondents, and that the alternate writ of mandamus heretofore issued herein ought to be made peremptory.

It is therefore ordered that a peremptory writ of mandamus issue against the said The Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, of said company, for the performance of the acts heretofore alternatively ordered, and that immediately upon the service of this writ they prepare under oath and deposit in the office of the superintendent of insurance of the State of Ohio a statement of the condition
11 of the Eagle Insurance Company of Cincinnati on the 31st day of December, 1892, as required by sections 3654 and 3655 Revised Statutes of Ohio.

It is further considered and adjudged by the court that the said relator recover from the defendants its costs herein expended, taxed at $—, for which, if not paid within — days, execution is awarded.

To all of which judgment and order of the court the respondents, by their counsel, except.

1893, October 19th.—Application for writ of error, copy of writ of error, bond for supersedeas, and copy of citation & return filed.

STATE OF OHIO, *City of Columbus,* } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error directed to us, we, under our seal, distinctly and openly, the record and pro-

ceedings within mentioned, with all things concerning the same, before the judges within named, in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court this twenty-fourth day of October, A. D. 1893.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER,
Deputy Clerk.

12 Supreme Court of Ohio.

THE STATE OF OHIO on the Relation of W. H. KINDER, Superintendent of Insurance of the State of Ohio, Plaintiff,
vs.
THE EAGLE INSURANCE COMPANY OF CINCINNATI and JOHN K. Green and Samuel P. Post, President and Secretary of said Eagle Insurance Company, Defendants.

On motion of the defendant-, it is hereby certified by the court and ordered to be made a part of the record herein that in the above-entitled cause there was involved the Federal question whether to subject the defendant corporation and its officers to the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio is in contravention of section 10, article 1, of the Constitution of the United States, such defendant corporation being organized under a special act of the General Assembly of the State of Ohio, passed March 22, 1850, and prior to the adoption of the present constitution of Ohio. It is further certified that the statement of the facts involved and the opinion of this court in said cause appear and are fully set forth in the exhibit hereto annexed marked "A."

Approved June 30th, 1893.

J. P. BRADBURY,
Chief Justice of the Supreme Court of Ohio.

13 EXHIBIT A.

(Supreme Court of Ohio.)

STATE *ex Rel.*
v.
EAGLE INSURANCE CO. } No. 3518.

Constitutional law—Impairing the obligation of contract—*Res judicata.*

1. A fire insurance company organized under a special charter before the adoption of the present constitution, is subject to such reasonable regulations as the legislature may prescribe by general law, and the public good may require—such regulations serving to secure the ends for which the company was

created, and not being repugnant to the franchises and privileges granted in its charter.

2. A fire insurance company thus incorporated, will not be exempt from a compliance with the requirements of sections 3654 and 3655 of the Revised Statutes, to prepare and deposit annually in the office of the superintendent of insurance, a statement of its condition, unless such exemption appear to have been clearly granted by its charter.

3. Where a judgment has been rendered by a court of competent jurisdiction, in favor of one of the parties to an action, for the reason that, otherwise, under an existing law, a chartered right of such successful party might be involved in danger, the judgment should not be conclusive in a subsequent action between the same parties, when the law has been so amended that such right is thereby assured.

(Decided April 25, 1893.)

Mandamus.

This is a proceeding to compel the Eagle Insurance Company of Cincinnati, to file with the superintendent of insurance, a statement of its condition on December 31, 1892, as required by sections 3654 and 3655 of the Revised Statutes of Ohio. The company was incorporated under an act passed March 22, 1850 (48 Ohio Laws, 498), which reads as follows:

"An act to incorporate the Eagle Insurance Company of Cincinnati.

"SEC. 1. Be it enacted by the General Assembly of the State of Ohio, That George Crawford, Timothy Griffith, Isaac Copelen, William Wood, Henry Kesler, Henry Brackman, George M. Herancourt, and the subscribers of the stock of this association and their successors, shall be and are hereby declared to be a body politic and corporate, by the name and style of the Eagle Insurance Company of Cincinnati, and in that name shall be capable in law to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity, and elsewhere, with full authority to acquire, hold, possess, occupy and enjoy, and the same to sell, convey and dispose of all such real estate as shall be necessary and convenient for the transaction of its business, or which may be conveyed in said company for the security or in payment of any debt which may become due and owing to the same, or in satisfaction of any judgment of a court of law or any order or decree of a court of equity in their favor, and to make and use a common seal, and the same to alter and renew at pleasure, and generally to do and perform all things relative to the object of this association.

"SEC. 2. That the capital stock of this company shall be one hundred thousand dollars, which may be increased at the pleasure of the majority of the stockholders to two hundred thousand dollars, divided into shares of one hundred dollars each; at the time of subscribing, there shall be paid on each share twenty-five dollars, and

the balance on each share shall be subject to the call of the directors, and shall be secured by endorsed notes payable on demand, or other property or stocks, to be approved by the board of directors. Moreover, if at any time the directors shall deem any such security insufficient, it shall be their duty to require additional security on such notes or obligations by them held for the payment of stocks as they shall deem best; and any stockholder failing to pay at the time and in the manner prescribed by the board, any portion of their stock remaining unpaid, or shall fail, neglect or refuse to give such additional securities as may be required of them, it shall be the duty of the directors to sell such delinquent share or shares at auction for cash to the highest bidder, after having given ten days' public notice of the time and place of sale, and the proceeds to be applied in payment of said shares; and, moreover, such delinquent stockholder shall be held liable in his individual capacity
14 for any balance remaining unpaid on said shares, and in case any excess shall arise from such sale after having paid up the delinquency and expenses of such sale, such excess shall be paid to said stockholder.

"SEC. 3. That so soon as four hundred shares are subscribed for and paid, or secured to be paid, as required in the second section of this act, the company shall be competent to transact all kinds of business for which it was established.

"SEC. 4. That the affairs of the company shall be managed by seven directors, all of whom shall be stockholders, to be elected as follows: A majority of the stockholders composing this association, shall hold a meeting for the first election of directors within one month after the amount of four hundred shares of stock shall be subscribed, and on the first Monday in May in each and every year thereafter, and choose by ballot seven directors, who shall be stockholders, and each share of stock shall entitle the holder thereof to one vote, and the directors so chosen shall serve to the first Monday in May, 1851, and until others are chosen. At their first meeting after every election, they shall choose by ballot a president from their own number, and in case of the death or disability of the president thus chosen, the directors shall fill the vacancy by ballot as before, and in case of a vacancy in the board of directors, it shall be filled by the remaining directors from the stockholders for the remainder of the year, and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in the board by this act.

"SEC. 5. That it shall be lawful for said company to insure all kinds of property against loss or damage by fire or any other cause or risk, in and out of the State; to make all kinds of insurance on goods, merchandise or other property in the course of transportation, whether on land or water, or any vessel or boats wherever they may be, to lend money upon bottomry or respondentia, to cause themselves to be insured against any loss or risk they may have incurred in the course of their business, and against any maritime or other risks, upon the interest which they may have in any

vessel, boat, goods, or merchandise, or other property, by means of any loan or loans which they may make on mortgages, bottomry, or respondentia, and generally to do and perform all other matters and things connected with and proper to promote these objects.

"SEC. 6. It shall be lawful for said company to invest all or any part of their capital stock, money, funds, or other property, in such a way as the directors shall deem best for the safety of the capital and interest of the stockholders, and may transfer, sell and dispose of any or all interest which the said company may have acquired by said investment, provided that it shall not be lawful for said corporation to use or employ any part of their capital stock, money, or other funds in buying or selling goods, wares, or merchandise, nor in the purchase of real estate, except as provided in the first section of this act, nor shall the said company trade in the business of exchange brokerage, nor issue or emit any bills of credit as a circulating medium of trade or exchange, or in any manner engage in the business or operation of banking.

"SEC. 7. That the president and directors shall declare such dividends of the profits of the business of the company as shall not impair nor in anywise lessen the capital stock of the same. The dividends shall be made half yearly, on the first Monday in January and July, and shall be paid to the stockholders ten days thereafter, but no dividends shall be paid to any stockholder whose stock is delinquent.

"SEC. 8. The transfers of stock may be made by any stockholder or his legal representative, subject to such restrictions as the board of directors shall from time to time make and establish.

"SEC. 9. That all policies or contracts of insurance that may be made or entered into by the said company, may be made either under or without the seal thereof, and shall be subscribed by the president or by such other officer as may be designated for that purpose by the board of directors, and attested by the secretary, and being so subscribed and attested shall be obligatory upon the said company according to the tenor, intent and meaning of this act, and of such policies or contracts, and all such policies or contracts so made, subscribed, attested and executed, and the loans and other business of the company may be made, conducted, and carried on without the presence of the whole of the directors, but by such committee or otherwise as the board may authorize, and the same shall be binding on the company.

"SEC. 10. That the individuals named in the first section of this act, or such committee as they shall appoint, shall receive the subscriptions to the capital stock of this company, and open books for that purpose at the city of Cincinnati aforesaid, upon two weeks' notice published in at least two daily papers of said city, which books shall continue open from day to day for ten days, unless the whole amount of the capital stock shall sooner be subscribed, and shall receive all moneys paid at the time of subscribing to said stock, and hold the same until the election of the first board of directors, when they shall dispose of it as said board may direct.

"SEC. 11. That the president and directors shall have power and

authority to appoint a secretary, and such other officers under them as shall be necessary for transacting the business of said institution, and may allow them such salaries as they shall judge reasonable, to order and establish such by-laws and regulations as shall appear to them necessary for regulating and conducting the concerns of said institution, not being contrary to, or inconsistent with this act, the constitution or laws of this State, and of the United States; they shall keep full, fair and correct entries of their transactions, which shall be at all times open to the inspection of the stockholders.

"SEC. 12. That should it so happen from any cause whatsoever, that the annual election of directors should not take place in any year on the day hereinbefore mentioned for that purpose, this corporation shall not be for that reason dissolved, but such election may be lawfully held on such other convenient day within six months thereafter, as may for that purpose be fixed by the president and directors, they causing ten days' notice thereof to be given in one or more of the newspapers printed in the city of Cincinnati.

"SEC. 13. That the president and directors may call a general meeting of the stockholders for any purpose relative to the affairs of the company, giving at least ten days' notice thereof in some newspaper printed in Cincinnati.

"BENJAMIN F. LEITER,
"*Speaker of the House of Representatives.*
"CHARLES C. CONVERS,
"*Speaker of the Senate.*

"March 22, 1850."

A statement of further facts necessary to an understanding of the questions arising upon the record, will appear in the opinion.

J. K. Richards, attorney general, for relator.
Follett & Kelley, for defendants.

DICKMAN, *J.*:

This proceeding is prosecuted on the relation of W. H. Kinder, superintendent of insurance of the State of Ohio, against the Eagle Insurance Company of Cincinnati, and John K. Green and Samuel P. Post, president and secretary of the company. It is alleged in the petition, that the company is a fire insurance company incorporated under an act passed March 22, 1850 (48 Ohio Laws, 498), and that it was and is the duty of the company and its president and secretary, to deposit in the office of the superintendent of insurance a statement of the condition of such company on the thirty-first day of December, 1892, as required by sections 3654 and 3655 of the Revised Statutes of Ohio; that proper blanks were furnished and due demand made, but that the company and its officers have refused and do refuse to file the required statement; and the company still continues to carry on the business of insurance. The prayer of the petition is, that writs of mandamus may be issued, compelling the company, its president and secretary, to comply with the provisions of the above-mentioned sections of the revised statutes.

The defendants answer, and set up two defenses. First, they aver that under the provisions of the act of March 22, 1850, which
16 constitutes the charter of the insurance company, no power was reserved to alter, amend or repeal the charter; and that if sections 3654 and 3655 impose any duty upon the defendants or either of them, they would impair the obligation of the contract embraced in the charter of the company, and would be in violation of section 28, of article 2, of the Constitution of Ohio, and of section 10, of article 1, of the Constitution of the United States.

The second defense contained in the answer is that of *res judicata*. It is averred by the defendants, that on or about July 27, 1886, the attorney general filed a petition in the court of common pleas of Franklin county, Ohio, in which The State of Ohio was plaintiff and The Eagle Insurance Company of Cincinnati was defendant, setting forth that the company and its officers, after due notice and request, had failed, neglected and refused to deposit, either on the first day of January, 1886, or within thirty days thereafter, the statement required by section 3654, of the Revised Statutes, showing the condition of the company on the thirty-first day of December, 1885, and praying judgment against the company for the five hundred dollars penalty and the "additional" thereto, as imposed by section 3655, of the Revised Statutes; that the insurance company in August, 1886, filed its answer, setting up that it was organized and existed as a corporation solely under and by virtue of the act of March 22, 1850, and was not subject to the provisions of sections 3654 and 3655, of the Revised Statutes; that in December, 1886, the State demurred to the company's answer, and on February 1, 1887, the demurrer being overruled, and the State not desiring to plead further, the action was dismissed by the court, and judgment rendered in favor of the company; that the State took the case by petition in error to the circuit court, and by that court the judgment of the court of common pleas was affirmed, and remains in full force.

To the answer in this proceeding, and to each of the defenses therein contained, the plaintiff demurs.

The Eagle Insurance Company is a corporation, created before the adoption of the present constitution, claiming to exercise certain rights, privileges and franchises, under a special act of the legislature which constitutes its charter. Obviously, such charter or act of the legislature, in connection with its acceptance, may be regarded as a contract, and one which, so long as the body corporate faithfully observes it, the legislature is constitutionally restrained from impairing, by annexing without the consent of the corporation new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of the contract. And any act of the legislature which violates any corporate right, secured by such charter of the corporation, without its consent, is void as against the constitution of the State and the United States.

But, in determining the corporate rights secured by the charter, the true rule of construction is, that corporations take nothing by intendment but what is necessary to the enjoyment of that which

is expressly granted. When a company is incorporated it is to be inferred, that the legislature intended it should exercise only those corporate powers that might be necessary to carry on the business for which the company was organized. And it may be stated as a rule of construction, that where there is a grant of special privileges in derogation of common right, or an exemption from the operation of general laws governing other persons or corporate bodies, it must always be presumed that the legislature does not design to confer franchises of this character, unless a contrary intention be expressed in unambiguous terms. Mor. Corp., § 323.

Though there may be no reservation in the charter of incorporation that the State shall have the right to repeal, alter, or amend it at pleasure, the grant of corporate powers, or of exemptions from the operation of general laws, will carry only those that are expressly or unambiguously granted. "The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law." Perrine *v.* Chesapeake and Delaware Canal Co., 9 How. (U. S.) 192. "A franchise must be created by express terms and cannot be inferred from the
17 mere silence of the charter." Zanesville *v.* Gas Light Co., 48 Ohio St. 31. As expressed by Chief Justice Marshall in the Dartmouth College case, "A corporation possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

When it is sought, therefore, to subject a company, claiming rights under a special charter, to the provisions of a general law, the question at once arises, are the requirements of the law plainly inconsistent with the enjoyment of the charter rights and franchises granted to the company. If the provisions of the general law are consistent with the rights of the corporation as secured by its charter, the corporation will be subject to the law-making power to the same extent as unincorporated individuals. It need hardly be stated, that when the legislature, by a special act or charter, clothes individuals with corporate power, they are not to be presumed as forever thereafter emancipated from all legislative control as to their corporate acts and franchises. A contract of exemption from such further legislation can never be implied.

An association deriving its corporate existence from the State, and engaged in a business of such a character that the public are directly interested in its proper management, should be subject to such reasonable regulations as will secure the ends of its creation. Not only the State may, but it is an obligation binding upon it, for the protection of its citizens, to see that such laws are passed and enforced, as will enable the State to know whether corporations are properly exercising their corporate privileges. It has accordingly been enacted by the General Assembly (Revised Statutes of Ohio, sec. 272), that when the superintendent of insurance has reason to suspect, that the affairs of an insurance company doing business in the State are in an unsound condition, he shall make, or cause to be made, by some person by him for that purpose appointed, an examination into the affairs of such company; and such company,

its officers and agents, shall submit their books and business to such examination, and in every way facilitate the same. From this salutary provision of the statute, no insurance company should be exempted, whether created before or since the adoption of the present constitution. Nor should it, in our judgment, be deemed an unwarranted exercise of the legislative power, if, instead of authorizing the superintendent of insurance to make an examination into the affairs of such company, the law should require the officers of such company to deposit with the superintendent a statement of the condition of the company at any designated time.

Section 3654, of the Revised Statutes, provides that, the president or vice-president and secretary of each insurance company organized under any law of this State shall annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting in form, and with specifications in detail, as prescribed by the statute: (1.) The amount of the capital stock of the company; (2.) The property or assets held by the company; (3.) The liabilities of the company; (4.) The income of the company during the preceding year; and, (5.) The expenditure during the preceding year.

The main proposition of counsel for the Eagle Insurance Company is, that the obligation of the contract which the company had with the State, in its charter, will be impaired if that company be held subject to the operation of sections 3654 and 3655. Upon an examination of the company's charter, we discover no repugnance between the requirements of those sections of the statute and the provisions of the charter. The charter does not, either in express terms or by implication, absolve the company from the duty of preparing and depositing the required statement of its condition; and it contains no language which, even by a strained construction or remote inference, would exempt the company from a compliance with the provisions of those sections.

Those provisions we regard as no more than reasonable regulations for the safety of the capital, interest of the
18 stockholders, and security of the public, entirely consistent with the corporate rights granted to the insurance company in its charter, and especially proper as a safeguard for policy-holders, entitled to know whether the affairs of the company are in a sound or unsound condition. The fact that the Eagle Insurance Company may be a corporation conducting its business upon a sound basis, does not release it from the operation of those reasonable regulations that may be prescribed by the legislature to promote the purposes of its creation, and which are not repugnant to its charter.

The regulation that the defendant and other insurance companies shall file the statement of their condition as required by statute, being such as we deem the public good requires, the reasonableness of such regulation may be illustrated by a reference to what the defendant company may be capable of under its charter, relative to

the object of its incorporation. It cannot be said, that the legislature has been shorn of all power by general law, to see that the defendant keeps within the line of its charter, and performs its corporate duties.

The charter fixes the capital stock of the association at one hundred thousand dollars, which may be increased to two hundred thousand dollars at the pleasure of a majority of the stockholders, to be divided into shares of one hundred dollars each. At the time of subscription, twenty-five dollars must be paid on each share, and the balance on each share is made subject to the call of the directors, and is to be secured by endorsed notes payable on demand, or other property. When four hundred shares are subscribed for and paid, or secured to be paid, the company becomes competent to transact all kinds of business for which it is established. Here are duties and limitations imposed. In such a case, it is not unreasonable that the company should be required to deposit a statement, as provided by section 3654, of the amount of its capital stock, specifying the amount paid and unpaid, and the amount of unpaid assessments on stock.

Again, the charter, in section 1, authorizes the company to hold such real estate only as shall be necessary for the transaction of its business, or may be taken as security for or in payment of a debt. Section 3654 properly provides, that in the statement of an insurance company's condition, there shall be specified the value of the real estate owned by such company, where it is situate, and the value of the buildings thereon.

Again, under the charter, it is not lawful for the corporation to use or employ any part of its capital stock, money or other funds, in buying or selling goods, wares or merchandise, nor in the purchase of real estate, except as provided in the first section of the charter; nor shall the company trade in the business of exchange brokerage, or in any manner engage in the business or operation of banking. An essential aid, in the enforcement of these prohibitions, is afforded by requiring in the company's statement a specification of its assets and liabilities.

Furthermore, by the charter it is provided, that the president and directors shall declare such dividends of the profits of the business of the company as shall not impair, nor in anywise lessen the capital stock of the same. Whether this rule is disregarded or complied with, the superintendent of insurance may be enabled to discover through a statement of the company's condition, which, in addition to the company's assets and liabilities, shall specify, in accordance with section 3651, the amount of dividends declared and due, and remaining unpaid—the amount of dividends, either cash or scrip, declared but not due—and the amount of dividends paid during the year.

In Chicago Life Insurance Company *v.* Needles, 113 U. S. 574, we find facts and conclusions bearing directly upon the decision we have reached in the case at bar. The Chicago Life Insurance Company was incorporated by special act of the General Assembly of Illinois, and vested with power to carry on the business of life in-

surance. Two years after the charter was granted the company, a general law of the State was approved and took effect, which required, among other things, that every life insurance company
19 incorporated in Illinois, should transmit to the auditor of state, on or before the first day of March, in each year, a sworn statement of its business, standing, and affairs, in the form prescribed or authorized by law, and adapted to its business; and empowered that officer to address inquiries to any company in relation to its doings or condition, or any other matter connected with its transactions, to which it was required to make prompt reply; and made it the auditor's duty to make, or cause to be made, an examination of its condition and affairs, whenever he deemed it expedient to do so, or whenever he had good reason to suspect the correctness of any annual statement, or that its affairs were in an unsound condition. The auditor of state acting under this and a subsequent statute, made an examination into the affairs of the Chicago Life Insurance Company, found it to be insolvent, instituted proceedings to wind up its affairs, and a final judgment was rendered enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the supreme court of the State, and to reverse the judgment of that court error was prosecuted in the Supreme Court of the United States.

It was contended by counsel, that the obligation of the contract which the company had with the State, in its original and amended charter, would be impaired, if the company were held subject to the operation of subsequent statutes regulating the business of life insurance, and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business.

"This position," said Justice Harlan, delivering the opinion of the court, "cannot be sustained, consistently with the power which the State has, and upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence."

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation is created. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not

belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted."

The same doctrine is recognized in Commonwealth *v.* Farmers' and Mechanics' Bank, 21 Pick., 542, as applied to the visitatorial power of the State over banks. And the law is clearly stated, to the same effect, in the opinion of the justices, 9 Cush., 604, in answer to the question submitted to them by the senate: "Is the corporation known as the 'Provident Institution for Savings in the Town of Boston,' chartered in the year 1816, subject to the general laws of the Commonwealth relating to savings banks and institutions for savings, passed since the granting of the charter aforesaid?" The judges in their answer express the opinion, that the legislature by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation; that the legislature could not be deprived of the power it holds for the public good, by any doubtful construction of the charter; that the position that the legislature had granted away any of its appropriate powers of legislation, could be supported only by clearly showing such grant; and that there appeared to be nothing in the charter of the Provident Institution for Savings in Boston, to exempt it from the provisions of the general laws, passed since the date of the charter, relating to savings banks.

We come now to consider the question, whether the judgment in the suit brought against the defendant, in July, 1886, in the court of common pleas of Franklin county, to recover a penalty is a bar to this action; whether by reason of the determination in that suit, the right to require the company to prepare and deposit in the office of the superintendent of insurance a statement of its condition, is *res judicata*. We do not think that the cause of action in the two cases can be held to be identical. In the one case, it was a failure of the company to file the statutory statement of its condition on the 31st day of December, 1885, and the suit was to recover the penalty prescribed by statute for such failure. In the present case, it is a refusal of the company to file such statement of its condition on the 31st day of December, 1892, and the proceeding is in mandamus to enforce a specific duty.

It is urged however, in behalf of the defendant, that the subject-matter now in controversy was drawn in question, and within the issue in the former judicial proceeding which terminated in a regular judgment on the merits. But the rule is well settled, that an adjudication affects no claims which the parties had no opportunity to litigate. There are many cases in which the judgment of a court will be *res judicata* as long as the circumstances continue the same, but will cease to be so whenever any change takes place in those circumstances. People *v.* Mercein, 3 Hill 416; Jones *v.* Petaluma, 35 Cal. 230. Thus, even where title has been tried in a writ of entry, intervening events affecting the issue may be shown, to prevent a former judgment from being conclusive; and the demandant may introduce evidence of a newly-acquired title by deed duly delivered

since the commencement of the former suit. Perkins *v.* Parker, 10 Allen 22. In Hall *v.* Levy, 10 L. R. C. P. 154, it was held, that a record works an estoppel only as to those matters capable of being controverted between the parties at the time of the proceedings in the action; and therefore although a deed may have been proved to be valid in one action, yet it may be shown in a subsequent suit to have become invalid, if the circumstances avoiding it have happened after the determination of the earlier action.

These cases, and others like them, rest upon the principle that after-acquired rights and change of circumstances may prevent the former judgment from operating as an estoppel in subsequent judicial proceedings. And to apply the principle to the case under consideration, where a judgment is rendered, by a court of competent jurisdiction, in favor of a party to the suit, for the reason that otherwise, under an existing law, a chartered right of such party might be placed in peril, the decision should not be conclusive in a subsequent action between the same parties, when the law has been so amended that such right is thereby assured.

The originals of sections 3654 and 3655 of the Revised Statutes, are found in sections 19 and 21 respectively of "An act to regulate insurance companies," passed April 15, 1867 (64 Ohio Laws 157). Subsequently, it was provided by section 3234 of the Revised Statutes, of 1880, as follows: "Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, (title II, part second, corporations) shall thereby and thereafter be deemed to have consented, and shall be held, to be a corporation, and to have and exercise all and singular its franchises, under the present constitution, and the laws passed in pursuance thereof, and not otherwise." To be a corporation under such conditions, is to be placed on the same footing with corporations formed under general laws, which may, from time to time, be altered or repealed. How reasonable soever might be the regulation that a statement of the condition of an insurance company, created before the adoption of the present constitution, should be filed with the superintendent of insurance, the question would at once be suggested, whether a compliance with such regulation might not be deemed a consent to be a corporation under the present constitution, and a waiver of the company's chartered rights. Section 3234 was accordingly amended, May 18, 1886, (83 Ohio Laws, 201), by adding the proviso: "That any fire insurance company so created, complying with the requirements of section 3655, shall not be deemed to have consented, and shall not be affected by the provisions of this section by reason of such compliance." While the law thus stood, the action was instituted, in July, 1886, by the attorney general, in the name of the State, in the court of common pleas of Franklin county, to recover the penalty from the Eagle Insurance Company for its failure, neglect and refusal to file the statement required by section 3654. As it was a compliance with sec. 3655, which, under the amendatory proviso was not to be deemed a consent to be a corporation under the present constitution, the court of common pleas overruled the demurrer of the

21

State, and rendered judgment for the company. The court thereby declined, virtually, to visit a penalty upon the company for non-compliance with the requirements of sec. 3654, when a voluntary compliance, at that time, might have involved in doubt, and perhaps in peril, the chartered privileges of the company.

But by act of March 8, 1892, (89 Ohio Laws, 73), the proviso to section 3234 was enlarged, so that any fire insurance company created before the adoption of the present constitution, complying with the requirements of sections 3654 and 3655, would not be deemed to have consented to be a corporation, and to exercise all its franchises under the present constitution and the laws passed in pursuance thereof. Had the proviso to section 3234 contained what it now does, and when this action was begun, the judgment in the former suit to recover the statutory penalty would doubtless have been different from what it was. Under the statute, as it now is, the filing of a statement under section 3654, with the superintendent of insurance, can cast no doubt or shade upon the inviolability of the defendant's charter, and the prosecution of a proceeding like the present, to enforce a compliance with the provisions of that section, should not, we think, be barred by the adjudication in the former suit. The obligation of the contract between the State and the defendant not having been impaired, and the State not being estopped to maintain this action by the judgment in the court of common pleas of Franklin county, we are of opinion, that a peremptory writ should be awarded.

22 [Endorsed:] # 3518. Supreme court of Ohio. The State of Ohio *ex rel.* W. H. Kinder, sup't, &c., *v.* The Eagle Insurance Co. *et al.* Certificate.

23 In the Supreme Court of the United States.

THE EAGLE INSURANCE COMPANY, Plaintiff in Error,
vs.
THE STATE OF OHIO, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the annexed certified copies from the record of the supreme court of Ohio of the petition for a writ of mandamus, of the alternative writ, of the answer, and of the demurrer, inadvertently omitted from the transcript heretofore filed, may now be filed as a part of the transcript herein, and that said copies constitute, with the transcript already filed, the true and complete transcript of the record in the supreme court of Ohio.

JOHN F. FOLLETT AND
THOS. H. KELLEY,
Of Counsel for Plaintiff in Error.
J. K. RICHARDS,
Attorney General.

Feb'y 14, 1894.

24 In the Supreme Court of Ohio.

THE STATE OF OHIO on the Relation of W. H. Kinder, Superintendent of Insurance of the State of Ohio, Plaintiff, *vs.* THE EAGLE INSURANCE COMPANY OF CINCINNATI and John K. Green and Samuel P. Post, President and Secretary of said Eagle Insurance Company, Defendants.	No. 3518. Filed March 14, 1893.

To the honorable the supreme court of Ohio:

Your petitioner, W. H. Kinder, represents that he has been, since May 5th, 1890, and now is the duly appointed, qualified, and acting superintendent of insurance of the State of Ohio, and as such has been and now is charged with the execution and enforcement of all laws relating to insurance.

The defendant The Eagle Insurance Company of Cincinnati is a corporation duly organized under the laws of Ohio, which is now and for many years last past has been engaged in this State in the business of fire, marine, and inland insurance. The said insurance company was organized by and under an act of the General Assembly of the State of Ohio entitled "An act to incorporate the Eagle Insurance Company of Cincinnati," passed March 22, 1850, which is printed on pages 498 to 501 of vol. 48 of the Laws of Ohio, and is hereby referred to and pleaded as if set out in full, which act empowered the said company "to insure all kinds of property against loss or damage by fire or other cause or risk in and out of the State; to make all kinds of insurance on goods,
25 merchandise, or other property in the course of transportation, whether on land or water or any vessel or boats, wherever they may be; to lend money upon bottomry or respondentia," and to do certain other things specified therein connected with and proper to promote the objects of the incorporation.

For more than two years last past the defendant John K. Green has been and he now is the president, and for said period the defendant Samuel P. Post has been and he now is the secretary, of said Eagle Insurance Company of Cincinnati. Under the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio it became and was the duty of the said president and secretary of such insurance company, acting on behalf of the company, on the first day of January, 1893, or within thirty days thereafter, to prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of such company on the 31st day of December, 1892, in the manner and form required by the sections mentioned. Proper blanks for the making of such statements were furnished the said company and its officers mentioned and due demand for the preparation and deposit of the statement made by this petitioner, but the said insurance company and its president and secretary, claiming that being a corporation created before the adoption of the present constitution it was not and is not subject

to the provisions of said sections 3654 and 3655, failed and refused to prepare and deposit in the office of the superintendent of insurance on the first day of January, 1893, or within thirty days thereafter, the statement described, and ever since such time have failed and refused and still do fail and refuse to prepare and deposit said statement, although it still remains and now is the duty of such company and its said president and secretary to prepare and
26 deposit in the office of the petitioner the statement described as required by the sections of the statutes referred to.

Your petitioner states that, notwithstanding the refusal to make such statement, the said company continues and will continue to carry on the business of insurance as aforesaid, and he submits that he is entirely without remedy to compel compliance with the law in the premises unless it be afforded by the interposition of this court.

Wherefore he prays that writs of mandamus may be issued against the said The Eagle Insurance Company of Cincinnati and the said John K. Green, president, and Samuel P. Post, secretary, of said company, commanding them forthwith to prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of said company on the 31st day of December, 1892, as required by the sections referred to, and for such other relief as may be proper in the premises.

J. K. RICHARDS,
Attorney General.

THE STATE OF OHIO, }
Franklin County, } ss:

W. H. Kinder, being duly sworn, says that he is the superintendent of insurance of the State of Ohio, and that the facts contained in the foregoing petition are true.

W. H. KINDER.

Sworn to before me and subscribed in my presence this 9th day of March, A. D. 1893.

C. O. L. COOPER,
[SEAL.] *Notary Public, Franklin County, Ohio.*

We hereby enter the appearance of defendants, and consent that an alternative writ may issue, returnable the 16th day of March, 1893.

FOLLETT & KELLEY,
Attorneys for Defendants.

27 THE STATE OF OHIO, }
City of Columbus, } ss:

Supreme Court of Ohio.

To the Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, of said company:

We hereby command you that forthwith, upon the receipt of this writ, you prepare, under oath, and deposit in the office of the super-

intendent of insurance a statement of the condition of the Eagle Insurance Company of Cincinnati on the 31st day of December, 1892, as required by sections 3654 and 3655, Revised Statutes, as we are asked in a petition to command you to do, a copy of which petition is hereto attached, marked "Exhibit A," or else that you appear in this court at 9 o'clock a. m. of Thursday, the 16th day of March, 1893, and show cause why you have not done or should not do so.

[SEAL.] Witness my name and the seal of said supreme court of Ohio this 14th day of March, A. D. 1893.

JOSIAH B. ALLEN,
Clerk of Supreme Court of Ohio.

28 To the sheriff of Hamilton county, Ohio:

You are hereby authorized and directed forthwith to make due service of this writ personally, by copy, upon the Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, of said company, and forthwith make return thereof.

[SEAL.] Witness my name and the seal of said supreme court of Ohio this 14th day of March, A. D. 1893.

JOSIAH B. ALLEN,
Clerk of Supreme Court of Ohio.

Service of this writ is hereby acknowledged this 15th day of March, 1893.

THE EAGLE INSURANCE COMPANY,
JOHN K. GREEN,
SAMUEL P. POST,
By FOLLETT & KELLEY, *Their Att'ys.*

29 EXHIBIT "A."

In the Supreme Court of Ohio.

THE STATE OF OHIO on the Relation of W. H. KINDER, Superintendent of Insurance of the State of Ohio, Plaintiff,
vs.
THE EAGLE INSURANCE COMPANY OF CINCINNATI and JOHN K. Green and Samuel P. Post, President and Secretary of said Eagle Insurance Company, Defendants.

To the honorable the supreme court of Ohio:

Your petitioner, W. H. Kinder, represents that he has been since May 5th, 1890, and now is the duly appointed, qualified, and acting superintendent of insurance of the State of Ohio, and as such has been and now is charged with the execution and enforcement of all laws relating to insurance.

The defendant The Eagle Insurance Company of Cincinnati is a corporation duly organized under the laws of Ohio, which is now and for many years last past has been engaged in this State in the

business of fire, marine, and inland insurance. The said insurance company was organized by and under an act of the General Assembly of the State of Ohio entitled "An act to incorporate the Eagle Insurance Company of Cincinnati," passed March 22, 1850, which is printed on pages 498 to 501 of vol. 48 of the Laws of Ohio, and is hereby referred to and pleaded as if set out in full, which act empowered the said company "to insure all kinds of property against loss or damage by fire or other cause or risk in and out of the State; to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel or boats, wherever they may be; to lend money upon bottomry or respondentia," and to do certain other things specified therein connected with and proper to promote the objects of the incorporation.

For more than two years last past the defendant John K. Green has been and he now is the president, and for said period the defendant Samuel P. Post has been and he now is the secretary, of said Eagle Insurance Company of Cincinnati. Under the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio it became and was the duty of the said president and secretary of such insurance company, acting on behalf of the company, on the first day of January, 1893, or within thirty days thereafter, to prepare, under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such company on the 31st day of December, 1892, in the manner and form required by the sections mentioned. Proper blanks for the making of such statement were furnished the said company and its officers mentioned and due demand for the preparation and deposit of the statement made by this petitioner, but the said insurance company and its said president and secretary, claiming that being a corporation created before the adoption of the present constitution it was not and is not subject to the provisions of said sections 3654 & 3655, failed and refused to prepare and deposit in the office of the superintendent of insurance on the first day of January, 1893, or within thirty days thereafter, the statement described, and ever since such time have failed and refused and still do fail and refuse to prepare and deposit said statement, although it still remains and now is the duty of such company and its said president and secretary to prepare and deposit in the office of the petitioner the statement described as required by the sections of the statutes referred to.

31 Your petitioner states that notwithstanding the refusal to make such statement the said company continues and will continue to carry on the business of insurance as aforesaid, and he submits that he is entirely without remedy to compel compliance with the law in the premises unless it be afforded by the interposition of this court.

Wherefore he prays that writs of mandamus may be issued against the said The Eagle Insurance Company of Cincinnati and the said John K. Green, president, and Samuel P. Post, secretary, of said company, commanding them forthwith to prepare under oath and deposit in the office of the superintendent of insurance a state-

ment of the condition of said company on the 31st day of December, 1892, as required by the sections referred to, and for such other relief as may be proper in the premises.

J. K. RICHARDS,
Attorney General.

THE STATE OF OHIO, }
Franklin County, } *ss:*

W. H. Kinder, being duly sworn, says that he is the superintendent of insurance of the State of Ohio, and that the facts contained in the foregoing petition are true.

W. H. KINDER.

Sworn to before me and subscribed in my *premises* this 9th day of March, A. D. 1893.

C. O. L. COOPER,
[SEAL.] *Notary Public, Franklin County, Ohio.*

We hereby enter the appearance of defendants and consent that an alternative writ may issue, returnable the 16th day of March, 1893.

FOLLETT & KELLEY,
Attorneys for Defendants.

32 Supreme Court of Ohio.

THE STATE OF OHIO on the Relation of W. H. KINDER, Superintendent of Insurance of the State of Ohio, Plaintiff,
vs.
THE EAGLE INSURANCE COMPANY OF CINCINNATI and JOHN K. Green and Samuel P. Post, President and Secretary of the said Eagle Insurance Company, Defendants.

Answer of Defendants.

The answer of the Eagle Insurance Company, John K. Green, president, and Samuel P. Post, secretary, of the said Eagle Insurance Company, to the petition and alternative writ of mandamus on the application in said supreme court made by the State of Ohio on the relation of W. H. Kinder, superintendent of Insurance of the State of Ohio.

Said defendants and each of them say that they admit that the said W. H. Kinder has been duly appointed and qualified and is now the acting superintendent of insurance of the State of Ohio, and that as such he has been and now is charged with the execution and enforcement of all laws relating to insurance.

Said defendants also admit that the Eagle Insurance Company is a corporation duly organized under the laws of Ohio, and that said company is now and for many years last past has been engaged in this State in the business of fire, marine, and inland insurance.

Said defendants also admit that the said insurance company was

organized by and under an act of the General Assembly of the State of Ohio entitled "An act to incorporate the Eagle Insurance
33 Company of Cincinnati," passed March 22, 1850, and that said act of incorporation empowered the said company to do and perform all and singular the matters and things set forth in said petition and to do certain other things specified therein connected with and proper to promote the objects of the incorporation.

Said defendants deny that under the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio it became and was the duty of the said president and secretary of said insurance company to prepare under oath and deposit in the office of the superintendent of insurance a statement of the condition of said company on the 31st day of December, 1892.

These defendants admit that proper blanks were furnished for the making of such statement, but deny that they were required to make such statement, and also deny that the provisions of said sections 3654 and 3655 of the Rev. Stat. of Ohio apply to or impose any duty whatever upon these defendants or either of them.

Said defendants aver that under the provisions of the act, hereinbefore referred to, constituting the charter of the said The Eagle Insurance Company no power whatever was reserved to alter, amend, or repeal the charter of said company, and that if said sections 3654 and 3655 of the Rev. Stat. of Ohio were intended to or do impose any duty upon these defendants or either of them they would impair the obligation of the contract embraced in said charter and would be violative of the provisions of sec. 28, art. 2, of the Constitution of the State of Ohio and of sec. 10, art. 1, of the Constitution of the United States, and that said sections, so far as intended, if such intention is found to exist, to apply to these defendants or either of them, would be wholly void and of no effect.

These defendants admit that the said company continues
34 and will continue to carry on the business of insurance as it has done continuously for more than forty years last past, and they aver that they are doing a large and prosperous insurance business and have abundant capital for that purpose, and that the business which they are doing and the capital employed in said business and all matters pertaining to the same have ever been and are now conducted and pursued strictly within the limits of the powers conferred by the said charter of the said company and not otherwise.

2. For further answer to the petition and alternative writ of mandamus herein said defendants say—

That on or about the 27th day of July, 1886, the attorney general of this State filed a petition in the court of common pleas of Franklin county, Ohio, in which The State of Ohio was plaintiff and this defendant, The Eagle Insurance Company, was defendant, case # 19090, setting forth substantially the same as the petition in this case; that this defendant, The Eagle Insurance Company, and its officers charged with said duty had failed, neglected, and refused, having been duly notified and requested so to do, to file the statement required by section 3654 of the Rev. Stat. of Ohio, showing

the condition of said company on the 31st day of December, 1885, either upon the 1st day of January, 1886, or within thirty days thereafter, and praying judgment against said company for the sum of five hundred dollars and also for the additional sum of five hundred dollars for each and every month that said company had continued to transact business as such company from and after the said 1st day of January, 1886, to the date of filing said petition; that the said Eagle Insurance Company, having been duly served with summons in said case, did, on the 28th day of August, 1886, file its answer setting forth that it was incorporated under the act set out in the petition of the
35 relator herein, and that it was organized and existed as a corporation solely under and by virtue of said act and was not subject to the provisions of sections 3654 and 3655 of the Rev. Stat. of Ohio; that afterwards, on the 22nd day of December, 1886, the said State of Ohio, by the attorney general of said State, filed a demurrer to the said answer, and on the 1st day of February, 1887, the said court overruled said demurrer, and, the plaintiff not desiring to plead further in said action, the said court dismissed said action and rendered judgment in favor of said defendant, which judgment remains in full force and unreversed; that the questions involved in said case were identically the same as those involved in this case, and that the said controversy was between the same parties, and the said court had full and complete jurisdiction to determine said question and the determination of the same was final and conclusive as between the parties hereto, and these defendants plead the said judgment as a bar to the further prosecution of this action; that the State of Ohio, by its attorney general, took said case by petition in error to the circuit court within and for said Franklin county, Ohio, in which court said case was on the — day of May, 1887, heard on such petition in error and the judgment of the said court of common pleas was affirmed, and a mandate from said circuit court showing the affirmance of such judgment was filed in said court of common pleas on the 6th day of May, 1887.

Said defendant- therefore prays that they and each of them may be hence dismissed, and that they may have judgment for their costs herein expended and for all proper relief.

THE EAGLE INSURANCE COMPANY,
JOHN K. GREEN, AND SAMUEL P. POST,
By FOLLETT & KELLEY, *Their Attorneys.*

36 STATE OF OHIO, }
Franklin County, } *ss:*

John F. Follett, being first duly sworn, says that he is one of the attorneys of the defendants herein; that said defendants and each of them are non-residents of and absent from said Franklin county, and that the matters stated in the foregoing answer are true, as he verily believes.

JOHN F. FOLLETT.

Subscribed in my presence and sworn to before me this 16th day of March, A. D. 1893.

JOSIAH B. ALLEN, *Clerk*,
[SEAL.] By JOHN P. DANA, *Deputy*.

37 In the Supreme Court of Ohio.

THE STATE OF OHIO on the Relation of W. H. KINDER, Superintendent of Insurance of the State of Ohio, Plaintiff,
vs.
THE EAGLE INSURANCE COMPANY OF CINCINNATI and JOHN K. Green, President, and Samuel P. Post, Secretary, of said Company, Defendants.

Demurrer to Answer of Defendants.

The plaintiff demurs to the answer of defendants and severally to each defense thereof on the ground that the same and neither of them state facts sufficient to constitute a defense to the petition or justify defendants in refusing to do the things they are commanded by the alternative writ to do.

J. K. RICHARDS,
Attorney-General.

38 STATE OF OHIO, } ss:
Franklin County, }

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing petition in mandamus, alternative writ of mandamus, answer, and demurrer are correctly copied from the original pleadings now on file in this office in the case of The State of Ohio on the relation of W. H. Kinder, superintendent of insurance of the State of Ohio, plaintiff, *vs.* The Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, of said company, defendants, No. 3518.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this eighth day of February, A. D. 1894.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

38½ [Endorsed:] No. 3518. Supreme court of Ohio. Ohio *ex rel.* W. H. Kinder, sup't of insurance, plaintiff, *vs.* The Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, of said Eagle Insurance Company, defendants. Certified copies of petition, alternative writ of mandamus, answer, and demurrer.

39 [Endorsed:] Case No. 15,435. Supreme Court U. S., October term, 1893. Term No., 1051. The Eagle Insurance Co. *et al.*, P. E., *vs.* The State of Ohio *ex rel.* W. H. Kinder, &c. Stipulation and addition to record. Filed Feb. 23, 1894.

Endorsed on cover: Case No. 15,435. Ohio supreme court. Term No., 1051. The Eagle Insurance Company of Cincinnati and John K. Green, president, and Samuel P. Post, secretary, plaintiffs in error, *vs.* The State of Ohio *ex rel.* W. H. Kinder, superintendent of insurance of the State of Ohio. Filed October 26th, 1893.

Office Supreme Court U. S.
FILED.
APR 5 1894
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers.] [March, 1894.

[15,435.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

The Eagle Insurance Company of Cincinnati and John K. Green and Samuel P. Post, President and Secretary of the said Eagle Insurance Co.,
Plaintiffs in Error.

No. 1051.] *vs.*

The State of Ohio, on the relation of W. H. Kinder, Superintendent of Insurance of the State of Ohio,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN F. FOLLETT,
THOMAS H. KELLEY,
Of Counsel for Plaintiffs in Error.

Robert Clarke & Co., Printers.] [*March, 1894.*

[15,435.]

SUPREME COURT OF THE UNITED STATES

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Plaintiffs in Error.

No. 1051.] *vs.*

The State of Ohio, on the relation of W. H. Kinder, Superintendent of Insurance of the State of Ohio,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The organic law of the State of Ohio is found in two constitutions, the first adopted in 1802, the other in 1851. The constitution of 1802 was silent as to the organization of corporations, and such corporations as existed in Ohio prior to the adoption of the constitution of 1851, derived their authority from special acts of the general assembly. This constitution conferred no power upon the legislature to alter, revoke or repeal acts granting special privileges or

immunities. A share-holder's liability was limited by the amount of his subscription. There was no legislation enacted for the government of corporations generally, but each incorporated body found its powers and its authorities defined in the special grant which called it into being.

Such was the condition on March 22, 1850, when the plaintiff in error, The Eagle Insurance Company of Cincinnati, was incorporated under a special act of the General Assembly of the State of Ohio. The act of incorporation is set out in full in the Appendix to this brief, and no power was reserved to the state to alter, amend or repeal its charter.

In 1851 the present constitution of Ohio was adopted. Under it special acts conferring corporate powers are prohibited. (See article xiii, section 1.) And no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. (Article i, section 2.)

Corporations can only be formed under general laws; but all such laws may, from time to time, be altered or repealed. (Article xiii, section 2.) The liability of shareholders is fixed by the following constitutional provision, to-wit:

"In all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." (Article xiii, section 3.)

Immediately this constitution was adopted the general assembly made provision for the creation and regulation of incorporated companies.

On April 15, 1867, an act was passed regulating insurance companies. (64 Ohio L. 157.) Section 19 of that act provides that it shall be the duty of the president or vice-

president and secretary of each company organized under it or incorporated under any law of the State of Ohio, annually, on the 1st day of January, or within one month thereafter, to prepare under oath, and deposit in the office of the auditor of state, a statement of the condition of such company on the 31st day of December then next preceding, giving with great definiteness and particularity all information asked for in the statute under separate items accompanying the five following heads, to-wit:

1. The amount of capital stock of the company.
2. The property or assets held by the company.
3. The liabilities of the company.
4. The income of the company during the preceding year.
5. The expenditures during the preceding year.

Section 21 of the same act provided that every insurance company organized under any law of this state failing to make and deposit such statement shall be subject to a penalty of five hundred dollars; and an additional five hundred dollars for every month that such companies shall continue thereafter to transact any business of insurance.

These sections, without important modification, are now known as sections 3654 and 3655 of the Revised Statutes of Ohio, and are to be found printed in full on pages 11–14 in the Appendix to this brief.

On March 12, 1872, the general assembly established a separate and distinct department of government known as the insurance department, and which was charged with the execution of all laws then in force, or which should thereafter be passed, in relation to insurance and insurance companies. (69 Ohio L. 32, sec. 1.) The chief officer of this department is styled the superintendent of insurance, and the annual statements from the officers of insurance

companies provided for in the foregoing sections are now made to him instead of to the auditor of state.

Section 3234 of the Revised Statutes of Ohio, as it was first passed, provided as follows:

"Corporations created before the adoption of the present constitution, which take any action under or pursuant to this title" (a title regulating corporations) "shall thereby and thereafter be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present constitution, and the laws passed in pursuance thereof, and not otherwise."

When annual statements began to be demanded of insurance companies in Ohio under the provisions of the act of April 15, 1867 (now sections 3654 and 3655, Rev. Stats.), above referred to, plaintiff in error refused to make such statement, and until 1886 it was not sought to include what are known as "old charter companies" within its provisions. On March 8, 1892 (89 Ohio L. 73), the general assembly passed an act amending section 3234 as given above, by providing that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or with any police regulation contained in chapter 11 of the title relating to corporations, or in chapter 8 of title 3, part first, of the Revised Statutes of Ohio, relating to the establishment of an insurance department in Ohio, should not be deemed to have consented, and should not be affected by the provisions of the title relating to corporations by reason of such compliance.

The plaintiff in error corporation has never filed a statement of its condition with the superintendent of insurance, and has never taken any action under or pursuant

to the general provisions of the laws of Ohio relating to corporations under the present constitution.

In March, 1893, the State of Ohio, on the relation of the superintendent of insurance, commenced an action in the Supreme Court of Ohio, in mandamus, against The Eagle Insurance Company of Cincinnati, and its president and secretary, to compel the preparation and filing of a statement of the condition of the company on December 31, 1892, in accordance with the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio, and the alternative writ issued.

The answer averred that, under the special act of the general assembly of the State of Ohio incorporating The Eagle Insurance Company, no power whatever was reserved to the state to alter, amend, or repeal the charter of this company, and that, if sections 3654 and 3655 of the Revised Statutes of Ohio were intended to or did impose any duty upon the defendants or either of them, they would impair the obligation of a contract embraced in the charter of the company, and would be violative of the provisions of article ii, section 28, of the constitution of the State of Ohio, and of article i, section 10, of the constitution of the United States.

To this answer a demurrer was filed by the state, the case was argued and submitted, and on April 25, 1893, a judgment awarding a peremptory writ of mandamus was rendered.

To reverse that judgment of the Supreme Court of Ohio this proceeding in error is prosecuted.

ARGUMENT.

The real question for submission to this tribunal is, whether, aided by legislative enactment, the insurance department of the executive branch of the government of Ohio, a department admittedly established for the regulation of insurance companies created by general laws under the present constitution, can extend its authority over a company operating under a special charter granted by the general assembly, which charter reserves no power in the legislature to alter, amend, or repeal it, and which was granted under the old constitution of Ohio, that gave the general assembly no authority to alter, revoke, or repeal acts granting special privileges or immunities.

The plaintiffs in error contend that to be subjected to a compliance with the provisions of sections 3654 and 3655 of the Revised Statutes of Ohio by the superintendent of insurance is in subversion of their contract rights with the State of Ohio and with their share-holders as a private corporation, and violates the tenth section of the first article of the federal constitution.

That a special charter granted by legislative authority of a state constitutes a contract between the state and the incorporators enforcible in the proper courts of the country, has not required argument in this forum since the decision of the Dartmouth College case. See the opinion of Mr. Justice Field, on page 225, of *The Delaware Railroad Tax case*, 18 Wallace, 206.

The plaintiff in error, The Eagle Insurance Company of Cincinnati, is a private corporation operated as a strictly private business enterprise, and is in no way connected

with the administration of government or a necessary part thereof. It is not to be confounded with those public corporations such as cities, counties, and towns organized for governmental and political purposes, nor with those semi-public corporations, such as railway, express, navigation, telegraph, and telephone companies, whose necessity is universal, and without which the business of the country would cease in this day and generation. This insurance company is a private commercial enterprise created by grant to George Crawford and six associates in the City of Cincinnati, in March, 1850, who, together with the subscribers of the stock of the association and their successors, were declared to be a body politic and corporate by the name and style of The Eagle Insurance Company of Cincinnati. In the city in which the corporation was authorized to be established, George Crawford and associates and their successors have done business ever since. The tenth section of their charter required them to open books at the City of Cincinnati for the subscriptions to the capital stock, and the twelfth section required a publication in one or more newspapers printed in Cincinnati of any election for directors which is not held on the day appointed by the charter for that purpose. Finally, section 13 provides:

"That the president and directors may call a general meeting of the stockholders for any purpose relative to the affairs of the company giving at least ten days' notice thereof in some newspaper printed in Cincinnati."

It will be observed, therefore, that this corporation or association was purely private and local in its character in the business transacted as well as in its very name. It had no authority, for its charter gave it none, to establish agencies elsewhere in Ohio or in other states; it could not if it had wished remove its business to the seat of govern-

ment in the state of its creation. To have done so would have violated the plain and manifest meaning and intendment of its charter.

We are not without the support of authorities in this court for our contention that the plaintiff in error is simply a private corporation.

In the Dartmouth College case, in the opinion of Mr. Justice Story, in the discussion as to the division of corporations, we find on page 669 the following language:

"A bank, whose stock is owned by private persons, is a private corporation although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person."

See also *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 907; Angell and Ames on Corporations, sec. 1.

II.

The legislation complained of is unconstitutional because the charter of the plaintiff in error upon acceptance became an executed contract with the state, and can not, in the absence of the abuse or misuse by the corporation of the privileges and franchises therein contained, be altered or modified except with its consent.

It will be remembered that in the constitution of Ohio of 1802, in force when the charter was granted to plaintiff in error, there was no power reserved to the legislature to alter, amend, or repeal corporate franchises such as is found in the present constitution. In the case of *Terrett* v. *Taylor*, 9 *Cranch*, 43, on pages 51 and 52, *Mr. Justice Story* gave

early expression to the opinion of this court as to the power of the state over private corporations. He says:

"A private corporation created by the legislature may lose its franchises by a misuser or a non-user of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations have a right to change, modify, enlarge, or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

Mr. Justice Clifford, in the opening sentences of his opinion in *Miller* v. *State* (15 Wall, on page 488), was quite as emphatic in limiting the power of the state to repeal, impair, or alter the charter of a private corporation.

"Corporate franchises, granted to private corpora-

tions, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of the constitution which ordains that no state shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the state and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, can not repeal, impair, or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent."

Almost the same language which we have quoted was adopted by *Mr. Justice Clifford*, speaking for this court, on pages 212 and 213, in his opinion in the *Pennsylvania College cases*, in 13 *Wallace*.

The charter of this corporation was absolute in its terms, and without any condition or reservation importing a different intent, and becomes therefore an executed contract within the protection of that clause of the constitution which prohibits the passage of any law by the states impairing the obligation of contracts. Nothing but the consent of the corporation itself or its default, judicially ascertained and declared, will justify the interference of the legislature in repealing, altering or impairing its charter. This rule, said the eminent Justice Clifford, is well settled. From the day of its acceptance of the charter granted to it, and its organization thereunder, down to the present day the plaintiff in error has never yielded assent

to a legislative enactment under the present constitution of Ohio, and has never violated a single provision of its charter.

Had there been any such violation, or had it become insolvent or ceased to accomplish the purposes for which it was created, the police power reposed in the authorities of the State of Ohio has always been ample to compel it to cease doing business. Such authority over this or over any other company in the state is not disputed. There has been no time in the history of American jurisprudence when the charters of corporations might not be forfeited for a misuser or nonuser of their franchises. (*Terrett* v. *Taylor*, 9 Cranch, on p. 51.)

In Ohio, section 6761, of the Revised Statutes (Appendix, p. 14), originally passed in 1838 (36 Ohio L. 68), is the legislative expression of the states' authority over all corporations. Under such a statute our charter was granted and by it are we bound. This legitimate exercise of the police power by the state has never been questioned. But if we look farther we find that the legislature of Ohio has created for the public additional safeguards against the unlawful action of insurance companies. Sections 272, 274 and 275 of the Revised Statutes of Ohio (Appendix, pp. 7, 8), give the superintendent of insuranee ample power to proceed against unsound insurance companies, and he need not wait until after making an official examination into the affairs of any such company, but may on a mere suspicion that all is not right, institute proceedings looking to the winding up of any insurance company of the state. Is further argument needed to show that the general welfare of the citizens of Ohio is not sufficiently protected against the misdoings of insurance corporations?

The case of *Chicago Insurance Co.* v. *Needles*, 113 U.

S. 574, is a distinct recognition of the authority of the state to enforce statutes similar in every respect to sections 272, 274, and 275 of the Revised Statutes of Ohio, and that such enforcement is a legitimate exercise of the police power. The second branch of the syllabus of that case is as follows:

"A grant of corporate franchises is necessarily subject to the condition that the privileges and franchises conferred shall not be abused; or employed to defeat the ends for which they were conferred; and that when abused or misemployed, they may be withdrawn by proceedings consistent with law."

And the fourth branch of the syllabus is as follows:

"The establishment against a corporation, before a judicial tribunal, in which opportunity for defense is afforded that it is insolvent; or that its condition is such as to render its continuance in business hazardous to the public, or to those who do business with it; or that it has exceeded its corporate power; or that it has violated the rules, restrictions, or conditions prescribed by law; constitute sufficient reason for the state which created it to reclaim the franchises and privileges granted to it."

"A state may enact laws to regulate insolvent companies. Laws enacted to secure a speedy winding up and dissolution of insolvent banking or insurance companies, and to provide a summary remedy to restrain their operations after they have become injurious to the public, merely provide new remedies for the enforcement of an undoubted right belonging to the state." *Morawetz on Private Corporations, sec.* 1077, citing *Insurance Co.* v. *Needles*, 113 U. S. 574.

With that exposition of the law applicable to insolvent corporations, whether created by special charter or general law, there can be no dispute. But this action is not of

that character. It has not been established before a judicial tribunal or elsewhere that The Eagle Insurance Company is insolvent; or that its condition is such as to render its continuance in business hazardous to the public, or to those who do business with it; or that it has exceeded its corporate powers; or that it has violated the rules, restrictions, or conditions prescribed by its charter. Until these things, or at least some of them, are shown, we submit that the privileges of our charter may not be withdrawn under proceedings at law, authorized by legislation to which we have not assented.

III.

Where neither the constitution nor the general laws of a state reserve the right to alter, amend, or repeal it, and a special charter is granted by the legislature, in which is reserved no right of amendment, alteration, or repeal, such charter carries with it its own exemption from future state dominion, save for police purposes alone.

Such exemption is also found in the silence of the constitution and laws of the state at the date of the charter upon the subject of alteration, amendment, or repeal, and need not be expressed in the charter itself. This is the logical conclusion to be derived from the following cases decided by this court.

"Charters may be altered, modified, or amended in all cases where the power to do so is reserved in the charter or in some antecedent general law." *Pennsylvania College Cases*, 13 Wall. 190.

"The power to alter, modify, or repeal an act of incorporation may be reserved to the state by a general

law applicable to all acts of incorporation; in which case the power may be exercised whenever the charter was granted subsequent to the passage of the general law." *Miller* v. *State*, 15 Wall. 478.

"A statute of a state, that all charters of corporations granted after its passage may be altered, amended, or repealed by the legislature, does not necessarily apply to supplements to an existing charter." *New Jersey* v. *Yard*, 95 U. S. 104.

The rights of a corporation are determined by the law in force when it came into being.

"The exemption from future general legislation, either by a constitutional provision or by an act of the legislature, will not be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words."

Such was the language of the late Mr. Juctice Blatchford in the closing paragraph of his opinion on page 84 in the very recent case of *Pennsylvania Railroad Co.* v. *Miller*, 132 U. S. 76, and forms the third branch of the syllabus. The constitution of Ohio being silent, the legislature of Ohio being silent, and the charter of plaintiff in error being equally silent on the subject of alteration, amendment, or repeal, and the grant of corporate powers being absolute on its face, we submit that "*an implication equally clear with express words*," required by this court in the case just cited, has been made out.

IV.

Sections 3654 *and* 3655 *are not to be construed alone, but in connection with the legislation of Ohio upon the subject of corporate regulations, applicable to insurance companies.*

After the adoption of the constitution of 1851, under which corporations could only be formed by general law, the legislature of Ohio made provision for the government of corporations previously organized. Sections 3232 and 3234, as then passed, enabled any such previously organized corporations, if they chose, to accept the provisions of the general corporation act and become corporations under the new dispensation. As already stated, the insurance department was created in 1872, and not until 1886 was a proviso added to section 3234, which proviso alone was amended in the form to be found in section 3234, as printed in the Appendix hereto, page 9. The law of corporations in Ohio embraces all of those sections of the Revised Statutes between sections 3232 and 3884*a*, both inclusive. The only sections relating to private corporations are sections 3232, 3233, and 3234 (Appendix, p. 9); all the balance of the legislation in reference to corporations on the statute books of Ohio to-day have reference to corporations organized under the present constitution and under general law. The legislative intent manifestly was that until private corporations had of their own motion accepted the provisions of the general corporation act, they were to be governed by the laws in force at the time of their creation. From 1851 to 1886, no other construction was put upon the corporation laws of Ohio.

"There is no better settled rule of the interpretation

of statutes, than that where there are earlier acts relating to the same subject, the survey must extend to them all; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law and each of them may explain and elucidate every other part of the common system to which it belongs." *Endlich on Interpretation of Statutes, sec.* 43, and numerous cases in this court, the courts of England, and the courts of most of the states cited in note *a*.

Let us examine some of the legislation in reference to the creation of the insurance department in Ohio in 1872. Section 284 (Appendix, page 8) requires every company doing business in the state to publish at least once a year in some newspaper of general circulation in every county where such company has an agent a certificate from the superintendent of insurance that such company has in all respects complied with the law of the state relating to insurance, the certificate to contain a statement under oath of the president and secretary of such insurance company of the actual amount of capital, the aggregate amount of assets and liabilities, together with the aggregate income and expenditures of such company for the year preceding. Section 288 (Appendix, page 8) provides a penalty of not more than one thousand dollars and not less than one hundred dollars for a violation of this or any other provision of the chapter, and section 289 (Appendix, page 8), that it shall be unlawful for any company, corporation, or association organized in the state or elsewhere, directly or indirectly to engage in the insurance business without having first complied with all the provisions of the chapter relating to the establishment of the insurance department. By this last section just referred to it was unlawful for any company to engage in the business of insurance except a certificate be first obtained from the superintendent of in-

surance showing a compliance with all the provisions of the law relating thereto, and sections 272, 274, and 275 (Appendix, pages 6 and 7), gave the superintendent of insurance ample power to deal with such an offender. The plaintiff in error has never since its organization complied with the provisions of any of these sections, and has never obtained a certificate from the superintendent of insurance in Ohio, as required by section 284, because to have done so would have brought it within the general laws of Ohio relating to insurance corporations. The unquestioned interpretation given these sections of the Ohio statutes just referred to, for more than twenty years, by the legislature, by the courts, by the bar, and by the executive department of the state itself charged with their execution, to wit, the superintendent of insurance and the attorney-general, is, that they apply to corporations organized under general law and not to private chartered companies organized before the constitution of 1851. Sections 3654 and 3655 (Appendix, pp. 11 and 13) were passed originally at the establishment of the insurance department in Ohio, and were a part of the general body in law enacted for the government of insurance companies organized under general law. Sections 3637, 3638, and 3639 (Appendix, pp. 9 and 10) provide for the investment of the capital and the accumulation of profit by insurance companies, and by section 3661*a* (Appendix, p. 14) any insurance company is prohibited from printing in any public advertisement, card, or circular a statement of assets which includes any item of value of a class or character not admitted by the superintendent of insurance of the state, and section 3661*b* (Appendix, p. 14) punishes a violation of 3661*a* with a fine of a thousand dollars. Thus, for plaintiff in error to voluntarily report under sections 3654 and

3655 would require a change of all investments which the company has in order to comply with sections 3637, 3638, and 3639. Not to make such change in investments would subject it to the penalty not only of section 3661*b*, but of section 289 as well. This examination of the acts *in pari materia* shows beyond question, we think, that to compel a compliance by private corporations with the provision of sections 3654 and 3655 by means of the loophole contained in the amendment of section 3234, is trifling with the legislative power, and ought never to be sustained as rightly belonging to the state's regulation of private corporations in Ohio. The original sections 3232, 3233, and 3234 stand alone and always have been unquestioned until the excrescence in the shape of the amendment of 1886 appeared added on to section 3234 and finally in the form now observed. This amendment properly belongs to and should be construed with the body of corporation law and not with sections 3232, 3233, and 3234, and we submit that the entire body of the law of Ohio upon the subject of corporations must be held to apply and relate to such corporations only as are formed under the present constitution, and that no statute should be upheld as constitutional which takes from private corporations the option given them of accepting or not, as they choose, the provisions of the general corporation act.

The penalty for failure to report inflicted by section 3655 no longer leaves it optional with private corporations to report or not as they choose—they must report or pay five hundred dollars a month for refusing. As was tersely said by one of the greatest jurists of this court, this is "truly a summary way of disposing of constitutional rights." No legislature has ever been sustained by this

court in such an arbitrary assumption and exercise of power.

"The meaning of language used in a statute must be understood to conform with, and be construed with reference to, the intention expressed upon the same subject-matter by the constitution." *Endlich on Interp. of Stats., sec.* 181.

Apply this rule to sections 3654 and 3655, in view of the provisions of the constitution of 1802, and can any one say it was not the intention of that instrument to free the charter of plaintiff in error from amendment, alteration, or repeal? As already stated, contemporary exposition of sections 3637, 3638, 3639, 3654 and 3655 has been that they applied only to corporations created under general law.

"It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority." *Endlich on Interp. of Stats., sec.* 357.

"But of almost equal dignity is the practical construction put upon an act by the governmental officers particularly charged with its execution, especially where so long continued as to have grown into a rule of the departmental practice. Thus the construction of a statute adopted and acted upon, by the executive, in the execution of his duty to give effect to the laws, or by the secretary of the treasury, or the construction of a general insurance law of a state by its attorney-general and other officers required to act under it, will, in cases of doubt and ambiguity,—but, it is said, only in such cases,—be adopted by the courts; or at least not disregarded by them, except for cogent reasons." *Endlich, sec.* 360. *Union Insurance Co.* v. *Hoge*, 21 *Howard*, 35.

For twenty years the officers of the insurance depart-

ment of Ohio, to-wit, the superintendent of insurance and the attorney-general, charged with the execution of the general laws relating to insurance companies since the establishment of such department, have put a practical construction upon sections 3654 and 3655, and that construction is that they apply only to corporations organized under general law. We contend that the amendment to section 3234 can not be permitted to override this contemporaneous exposition of the general law in reference to what insurance companies are to report to the insurance department.

V.

The legislation complained of violates the contract of the corporation with its share-holders.

Under the constitution of 1802 the limit of a share-holder's liability was the amount of his subscription, under the constitution of 1851 it is twice that amount. Section 1 of the charter provides that George Crawford and six named associates and "*the subscribers of the stock of this association and their successors*, shall be and are hereby declared to be a body politic and corporate by the name and style of the Eagle Insurance Company of Cincinnati." The share-holders in any corporation embark their capital in the corporate venture on the faith of the constitution and laws of the state at the time of the granting of the company's charter. See *Morawetz on Priv. Corporations*, *sec.* 1047. *Black on Constitutional Prohibitions*, *sec.* 15.

"A state can not in any manner alter the mutual relationship between the members of a corporation, nor their relative rights and duties, as established by their voluntary agreement when the company was formed . . . and a law imposing a liability upon share-holders to pay assess-

ments which they had not agreed to pay, or a law materially altering the powers of the directors or changing the agencies by which a corporation is managed. *Mora. on Priv. Corp., sec.* 1059.

Section 1078 of this author is particularly applicable to the case at bar, for there it is stated that

"A far more immediate interference with private rights occurs where laws are passed altering the rights and duties of the individual members of a corporation or copartnership, as they stood when the association was originally formed. A law subjecting the share-holders to a liability to contribute more capital than they originally agreed to contribute would clearly be unconstitutional. The same would evidently be true of a law increasing the liability of share-holders to creditors under existing contracts."

But a case directly in point is that of *Ireland* v. *Palestine, etc., Turnpike Co.*, 19 Ohio State, 369. Plaintiff in error in that case was a subscriber to the capital stock of a private corporation in Ohio, organized in 1849, and had fully paid up his subscription, and the law under which the company was organized imposed no individual liability on stockholders beyond the amount of their subscriptions. By an act of May 3, 1852 (S. & C. 289), such companies as should accept the provisions of said act were authorized if necessary to issue bonds to complete their roads, and stockholders of all companies accepting the act were declared to be individually liable to the amount of their stock for the payment of bonds so issued for the completion of the road. Ireland did not consent to the acceptance of the act of May 3, 1852, and refused to pay his assessment. The liability feature of the act of May 3, 1852, was simply declaratory of the constitutional and statutory

provision which would have applied without any such special enactment, to-wit, that stockholders of an old corporation who accepted the provisions of the laws made in pursuance of the new constitution would be held to exercise all their franchises as a corporation under the new constitution. One of these was that of the double liability of stockholders. The decision of that case as found in the first branch of the syllabus is, that the act of May 3, 1852, in so far as it undertakes to impose upon stockholders, without their assent, individual liabilities not imposed by their charters, or by the laws under which they had been organized, is a law impairing the validity of the stockholder's contract with the company, and, therefore, unconstitutional.

Judge Welch, speaking for the court, says on page 372, that:

"In a contract between the company and the stockholder, or in an action by the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. *He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of that contract, interpreted and limited by the laws under which it was made. By his contract with this company, Ireland agreed to pay a specific sum, and no more. This sum he has fully paid, and to require him to contribute an additional amount would be to violate the contract between the parties.*"

The limit of a share-holder's liability in The Eagle Insurance Company under the constitution and laws of Ohio at the time of its organization, was measured by the face value of the stock subscribed for by him, and subsequent legislation, which subjects that company to the same laws which apply to corporations generally, adds just -

one hundred per cent to his liability, and is unconstitutional and void.

Further than this, *sec.* 282 imposes a burden upon reporting companies of *twenty dollars*, which is the fee provided to be paid to the superintendent of insurance for the filing of each annual statement.

This is a new and additional requirement not found in the charter of plaintiff in error, and in violation of the contract with the state.

This comes clearly within the prohibition included in the sections of *Morawetz on Private Corporations* and *Black on Constitutional Prohibitions*, above quoted.

VI.

Sections 3654 *and* 3655 *abridge the franchises of plaintiff in error respecting its investments and the management of its funds, and are, therefore, repugnant to the constitution and void.*

The charter of the plaintiff in error gives it power to invest all or any part of its capital stock, money, funds, or other property, in such a way as the directors shall deem best, and the contract of the state with the corporation is impaired when any legislation requires any particular kind of investments, for such legislation enlarges the power of the state over the corporation. We have contended that sections 3654 and 3655 can not be singled out, stood up alone, and construed without reference to the whole body of the law governing insurance companies in the State of Ohio, but must find their place in and as a part of the legislation to a given end, to wit, corporate regulation. Section 3637 prescribes a mandatory method for the investment of the capital of insurance companies.

Such is not the method included in the grant to plaintiff in error. Section 3638 prescribes given limits within which investments of surplus may be made by insurance companies, and section 3639 puts a limit upon all powers of investment by insurance companies and makes the directors personally liable for any unauthorized investment or loan. The stock of the plaintiff in error corporation has a market value to investors, first, because of the single liability attached to its ownership, and second, because the directors are permitted to range over the whole field of profitable investments, and are not hampered and limited by the provisions of sections 3637, 3638, and 3639 of the Revised Statutes of Ohio. We do not think it will be questioned that any constitutionul provision or act of the legislature that impairs the charter of a private corporation, whether by enlarging the power of the state over the body corporate or by abridging its franchises, or otherwise altering it in a material point, is repugnant to the constitution and void. It is certainly a material and valuable element of a corporate franchise to be permitted to choose the best class of investments that present themselves to the attention of those who are managing and directing the affairs of the corporation. This court has said in *Planters Bank* v. *Sharp*, 6 *Howard*, 301, that a corporation is protected by the constitution in the use and enjoyment of all such rights and powers as are specifically granted by its charter, and any legislation which takes away those rights or curtails those powers is invalid. We think no one will be heard to say that the right to invest its funds as its directors might deem best was not specifically granted by the charter of plaintiff in error. We assert that those rights have been invaded by legislation and those powers curtailed, and that such acts are invalid.

VII.

Legislative control over private corporations can only be justified, when either the public health, the public morals or the public welfare, demands the imposition of some purely police regulation.

"A state's police power comes very near to the field committed by the constitution to congress, and it is the duty of courts to guard vigilantly against any needless intrusion." *Hannibal & St. Joe R. R. Co.*, v. *Husen*, 95 *U. S.* 465.

In the elaborate consideration of this question, found in the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 *U. S.* 650, and to which we will have occasion to make further reference hereafter, *Mr. Justice Harlan*, adopting the language of *Chief Justice Taney* in *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 *Howard*, 415, says:

"If the contract was within the scope of the authority conferred by the constitution of the state, it is like any other contract made by competent authority, binding upon the party. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the Constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of the court to carry it into execution. That duty must be performed."

Continuing the discussion, *Mr. Justice Harlan* says further, that

"The constitutional prohibition upon state laws impairing the obligation of a contract does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contract. Rights and

privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

In deciding the case of the *Piqua Branch of the State Bank of Ohio* v. *Knoop*, 16 *How.* 369, *Justice McLean, p.* 370, says:

"Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which can not be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, can not, without its consent, become a subject for legislative action."

And again, in the case of *Philadelphia, etc., R. R. Co.* v. *Bowers*, 4 *Houst.* (*Del.*) 506, the police power of a state is defined as follows:

"The police power of a state comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society, but the proper limit in its bearing upon chartered rights and privileges of private corporations for public uses would seem to be this, . . . that the legislature may at all times regulate the exercise of the corporate franchise, by general laws, passed in good faith for the legitimate end contemplated by the state police power, that is, for the peace, good order, health, comfort, and welfare of society; but it can not, under the color of such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to the beneficial exercise of it."

In *Tiedeman's Limitations of Police Power*, section 1, the definition of police power of the state is given, and the close of the section is as follows:

"It is to be observed, therefore, that the police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as the civil law maxim, *sic utere tuo, ut alienum non laedas.* 'This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *sic utere tuo, ut alienum non laedas*, it being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, can not be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions."

Judge Cooley, in his admirable and learned work on *Constitutional Limitations*, *577, declares:

"That the limit to the exercise of the police power in these cases must be this: 'The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact and not amendments of the charter in curtailment of the corporate franchise. The maxim, *Sic utere tuo ut alienum non laedas*, is that which lies at the

foundation of the power; and to whatever enactment affecting the management and business of private corporations it can not fairly be applied, the power itself will not extend."

Black on Constitutional Prohibitions, sec. 62, observes, that the police power must not be extended beyond its necessary and proper limits. When the police power has fulfilled the essential objects of its reservation to the state, it has also reached the boundaries of its legitimate exercise.

Judge Christiancy, in the case of *People* v. *Jackson Plankroad*, 9 Mich. 307, has said:

"Powers which can only be justified on the specific ground of being police regulations, and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort, and well being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence, and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

The contracts which the constitution protects are those relating to property rights, not governmental.

Says *Black on Constitutional Prohibitions*, sec. 62:

"*Mr. Justice Harlan*, in *The New Orleans Gas-Light Company* case, in 115 U. S. 650, has given the term "police power" its exact definition and limitation in such cases as the one at bar. . . .

"Reviewing the recent adjudications of this court in which the extent and limitations of the police power had been pointed out, reached the conclusion that, where reference is made to that police power which is always

reserved to the state, with which the state never parts, which the legislature can never sell or bargain away, its sphere must be limited to the two subjects of the public health and the public morals."

This was the ground of the decisions of this court in the cases of *Beer Co.* v. *Massachusetts*, 97 *U. S.* 32; *Fertilizing Co.* v. *Hyde Park*, 97 *U. S.* 663; *Stone* v. *Mississippi*, 101 *U. S.* 814; *Butchers' Union Co.* v. *Crescent City Live Stock Co.*, 111 *U. S.* 746.

"This principle was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals." *Black on Const. Prohib., sec.* 62.

The protection of life and property, the prevention of nuisances, the stoppage of the evils of spirituous liquors, the suppression of lotteries, the securing of the health and education of the community, and providing for the speedy winding up and dissolution of *insolvent* banking or insurance companies, as well as summarily restraining their operations *after they have become injurious to the public*, all authorities and all courts concede to be legitimate subjects of police regulation.

The conduct of a fire insurance business authorized by such a grant as was given to plaintiff in error can not be attended with any injury whatever to either the public health or the public morals; no more can the public safety be endangered so long as its franchises remain unviolated. Until the contrary of this proposition is shown, legislative invasion of its constitutional rights is unauthorized.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

We have been favored with a copy of the argument of the attorney-general in this case, and desire to add a few words by way of reply thereto.

In the first place, it is not the "well settled rule of this court" in all cases, that upon the construction of the statutes of a state and the effect of certain amendments thereof, the decision of the Supreme Court of that state must be accepted as final and conclusive. The exception is the identical case under consideration. Where a contract of the state is to be interpreted, no such rule as counsel claim has ever obtained.

There is a very important decision of this court on this question, which came into this court, as does this case, from the Supreme Court of Ohio. This case is that of *The Jefferson Branch of the State Bank of Ohio* v. *Skelly*, 1 *Black*, 436. There it is decided that:

"The constructions given by the courts of the states to state legislation and to state constitutions are conclusive upon this court, except when it is called upon to interpret the contracts of states.

This court has appellate power to revise the judgment of the Supreme Court of a state, whenever such court shall adjudge that not to be a contract which is alleged in legal proceedings, to be one, within the meaning of that clause of the constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts."

This appellate power in this court has never been de-

nied in such cases, said *Mr. Justice Wayne*, in deciding the case.

"Of what use," he adds, "would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state?

It never was intended, and can not be sustained by any course of reasoning, that this court should or could, with fidelity to the constitution of the United States, follow the construction of the Supreme Court of a state in such a matter when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made a covenant or agreement by the agents of a state by its authority."

In the case of *Wright* v. *Nagle*, 101 *U. S.* 791, the late Chief-Justice of this court spoke as follows (p. 793):

"It is true that ordinarily such a construction (a state's construction of its own statutes) would be conclusive upon us. One exception, however, exists to this rule, and that is when the state court has been called upon to interpret the contracts of states, though they have been made in the forms of law, or by the instrumentality of a state's authorized functionaries in conformity with state legislation."

Citing, *Jefferson Branch Bank* v. *Skelly*, 1 *Black*, 436.

It is stated by *Mr. Justice Harlan*, as late as the case of *Chicago Life Ins. Co.* v. *Needles*, 113 *U. S.*, on page 579, that this court has jurisdiction to inquire whether any

right or privilege protected by the constitution of the United States has been withheld or denied by the judgment below.

We agree that what is not granted in terms or by necessary implication in a private charter is reserved to the state. But if the implication which follows be, as Justice Blatchford said in *New Jersey* v. *Yard*, 95 *U. S.* 104, "equally clear with express words," exemption from future general legislation must be admitted to exist.

We understand counsel for the State of Ohio to urge that a private insurance company organized in 1850 with no reserved power of amendment, alteration, or repeal, expressed either in its charter, in the laws of the state, or in the constitution, is bound to comply with all the legislative regulation of a state department created in 1872, under a constitution and laws making every corporate act subject to amendment, alteration, or repeal, because exemption from such compliance is not expressed in so many words in its charter.

How could the incorporators of the plaintiff in error corporation be bound by any laws save those in existence at the date of their grant of power?

We refer to the case of *Ireland* v. *Palestine, etc., Turnpike Co.*, 19 *Ohio St.* 369, as an Ohio authority on this point.

In *Providence Bank* v. *Billings*, 4 *Peters*, 515, cited by the attorney-general, the question was one of taxation—an ingredient of sovereignty—and hence when exemption therefrom is granted in the charter the contrary can not be implied through its silence.

In the case of *Thorp* v. *Railway Company*, 27 *Vermont*, 140, the right to require a railroad to maintain cattle-

guards is a legitimate police regulation in the interest of the public safety.

The public has no further right to interfere in the affairs of the plaintiff corporation through the means of legislation—such as is now under consideration—than it has to compel any special or general copartnership to make its investments in a prescribed form, and to report annually to a superintendent of the state's creation.

Sec. 6761 furnishes the state ample power to get rid of any corporation "when it has offended against a provision of an act for its creation," or "when it has misused a franchise, privilege, or right conferred upon it by law." We stand in this presence acquitted of any charge upon which to base an action in *quo warranto*.

We insist that we can be reached in the interest of public safety in no other way except under the police regulation contained in section 6761.

The case of *Chicago Insurance Co.* v. *Needles*, 113 *U. S.* 574, does not support the position claimed by the attorney-general. We do not dispute the proposition that the state has the right to enact summary methods of dealing with insolvent corporations, and to prevent their further transaction of business in the state.

But this can only be done, says Mr. Justice Harlan, after it has been judicially ascertained that the corporation is insolvent; or that its condition is such as to render its continuance in business hazardous to the public, or to those who do business with it; or that it has exceeded its corporate powers, or that it has violated the rules, restrictions, or conditions prescribed by law. Nothing of this kind has been ascertained in this case.

Under the discussion of subject of the limits of police

regulation, there is not a case cited in our adversary's brief which was not decided on the ground that action of the state related to the preservation of the public health, the public morals, or the public safety.

We have not argued that the state can barter away its duty of protection to its citizens in the particulars mentioned. What we have urged is that the legislation in issue here accomplishes none of these ends, and is therefore void.

As to the effect of the amendment of section 3234, we have insisted that the original section which was merely declaratory of our common-law right to remain undisturbed in our franchises can not, by amendment, deprive us of our right to adopt the general corporation laws of Ohio as we see fit. In other words, we are not to be compelled to accept the provisions of the general corporation act whether we will or no, and inflicted with a penalty of five hundred dollars a month for refusing.

That there have been some insurance companies in Ohio which did not comply with the law does not make a case against this plaintiff in error, for by its contract with the State of Ohio by the laws and the constitution at the time of its creation it is to be judged, not otherwise.

We can not find more appropriate words with which to close this argument than to borrow from *Mr. Justice Story*, on page 712, of the *Dartmouth College* case:

"In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, with-

out its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant."

Respectfully submitted.

JOHN F. FOLLETT,

THOMAS H. KELLEY,

Of Counsel for Plaintiffs in Error.

MARCH 24, 1894.

APPENDIX.

AN ACT TO INCORPORATE THE EAGLE INSURANCE COMPANY OF CINCINNATI.

(48 Ohio Laws, 498.)

SEC. 1. *Be it enacted by the General Assembly of the State of Ohio*, That George Crawford, Timothy Griffith, Isaac C. Copelen, William Wood, Henry Kessler, Henry Brachman, George M. Herincourt, and the subscribers of the stock of this association and their successors, shall be and are hereby declared to be a body politic and corporate, by the name and style of the Eagle Insurance Company of Cincinnati, and in that name shall be capable, in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity and elsewhere, with full authority to acquire, hold, possess, occupy, and enjoy, and the same to sell, convey, and dispose of all such real estate as shall be necessary and convenient for the transaction of its business, or which may be conveyed in said company for the security or in payment of any debt which may become due and owing to the same, or in satisfaction of any judgment of a court of law, or any order or decree of a court of equity in their favor, and to make and use a common seal, and the same to alter and renew at pleasure, and generally to do and perform all things relative to the object of this association.

SEC. 2. That the capital stock of this company shall be one hundred thousand dollars, which may be increased at the pleasure of a majority of the stockholders to two hundred thousand dollars, divided into shares of one hun-

dred dollars each. At the time of subscribing there shall be paid on each share, twenty-five dollars, and the balance on each share shall be subject to the call of the directors, and shall be secured by indorsed notes payable on demand, or other property or stocks, to be approved by the board of directors. Moreover, if at any time the directors shall deem any such security insufficient, it shall be their duty to require additional security on such notes or obligations by them held for the payment of stocks as they shall deem best; and any stockholder failing to pay at the time and in the manner prescribed by the board, any portion of their stock remaining unpaid, or shall fail, neglect, or refuse to give such additional securities as may be required of them, it shall be the duty of the directors to sell such delinquent share or shares at auction, for cash, to the highest bidder, after having given ten days public notice of the time and place of sale, and the proceeds to be applied in payment of said shares; and moreover, such delinquent stockholder shall be held liable in his individual capacity for any balance remaining unpaid on said shares, and in case any excess shall arise from such sale, after having paid up the delinquency and expenses of such sale, such excess shall be paid to said stockholder.

SEC. 3. That so soon as four hundred shares are subscribed for, and paid or secured to be paid as required in the second section of this act, the company shall be competent to transact all kinds of business for which it is established.

SEC. 4. That the affairs of the company shall be managed by seven directors, all of whom shall be stockholders, to be elected as follows: a majority of the stockholders composing this association shall hold a meeting for the first election of directors within one month after the amount of four hundred shares of stock shall be subscribed, and on the first Monday in May in each and every year thereafter, and choose by ballot seven directors, who shall be stockholders, and each share of stock shall entitle the holder thereof to one vote, and the directors so chosen shall serve to the first Monday in May, 1851, and until others

are chosen. At their first meeting after every election, they shall choose, by ballot, a president from their own number, and in case of the death or disability of the president thus chosen, the directors shall fill the vacancy by ballot, as before, and in case of a vacancy in the board of directors, it shall be filled by the remaining directors from the stockholders, for the remainder of the year, and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in the board by this act.

SEC. 5. That it shall be lawful for said company to insure all kinds of property against loss or damage by fire or any other cause, or risk in and out of the state; to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel or boats, wherever they may be, to lend money upon bottomry or respondentia; to cause themselves to be insured against any loss or risk they may have incurred in the course of their business, and against any maritime or other risks, upon the interest which they may have in any vessel, boat, goods, merchandise, or other property by means of any loan or loans which they may make on mortgage, bottomry, or respondentia, and generally to do and perform all other matters and things connected with and proper to promote these objects.

SEC. 6. It shall be lawful for said company to invest all or any part of their capital stock, money, funds or other property, in such a way as the directors shall deem to be best for the safety of the capital and interest of the stockholders, and may transfer, sell and dispose of any or all interest which the said company may have acquired by said investment: *Provided*, that it shall not be lawful for said corporation to use or employ any part of their capital stock, moneys, or other funds in buying or selling goods, wares, or merchandise, nor in the purchase of real estate, except as provided in the first section of this act; nor shall said company trade in the business of exchange brokerage, nor issue or emit any bills of credit as a circulating medium of

trade or exchange, or in any manner engage in the business or operation of banking.

SEC. 7. That the president and directors shall declare such dividends of the profits of the business of the company as shall not impair nor in any wise lessen the capital stock of the same. The dividends shall be made half-yearly on the first Monday in January and July, and shall be paid to the stockholders ten days thereafter; but no dividend shall be paid to any stockholder whose stock is delinquent.

SEC. 8. The transfers of stock may be made by any stockholder or his legal representative, subject to such restrictions as the board of directors shall from time to time make and establish.

SEC. 9. That all policies or contracts of insurance that may be made or entered into by the said company, may be made either under or without the seal thereof, and shall be subscribed by the president or by such other officer as may be designated for that purpose by the board of directors, and attested by the secretary, and being so subscribed and attested, shall be obligatory upon the said company according to the tenor, intent and meaning of this act, and of such policies or contracts, and all such policies or contracts so made, subscribed, attested and executed, and the loans and other business of the company may be made, conducted and carried on without the presence of the whole of the directors, but by such committee or otherwise as the board may authorize, and the same shall be binding on the company.

SEC. 10. That the individuals named in the first section of this act, or such committee as they shall appoint, shall receive the subscriptions to the capital stock of this company, and open books for that purpose at the City of Cincinnati aforesaid, upon two weeks' notice published in at least two daily papers of said city, which books shall continue open from day to day for ten days, unless the whole amount of the capital stock shall sooner be subscribed, and shall receive all moneys paid at the time of subscribing to said stock, and hold the same until the

election of the first board of directors, when they shall dispose of it as said board may direct.

SEC. 11. That the president and directors shall have power and authority to appoint a secretary, and such other officers under them as shall be necessary for transacting the business of said institution, and may allow them such salaries as they shall judge reasonable;—to ordain and establish such by-laws and regulations as shall appear to them necessary for regulating and conducting the concerns of said institution, not being contrary to or inconsistent with this act, the constitution or laws of this state, and of the United States. They shall keep full, fair and correct entries of their transactions, which shall be at all times open to the inspection of the stockholders.

SEC. 12. That should it so happen from any cause whatsoever that the annual election of directors should not take place in any year on the day hereinbefore mentioned for that purpose, this corporation shall not be for that reason dissolved, but such election may be lawfully held on such other convenient day, within six months thereafter, as may for that purpose be fixed by the president and directors, they causing ten days' notice thereof to be given in one or more of the newspapers printed in the City of Cincinnati.

SEC. 13. That the president and directors may call a general meeting of the stockholders for any purpose relative to the affairs of the company, giving at least ten days' notice thereof in some newspaper printed in Cincinnati.

BENJAMIN F. LEITER,
Speaker of the House of Representatives.
CHARLES C. CONVERS,
MARCH 22, 1850. *Speaker of the Senate.*

REVISED STATUTES OF OHIO.

SEC. 266. The superintendent of insurance shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office for three years;

and no person shall be appointed who is not an elector of this state, or who has any official connection with an insurance company, owns any stock in such company, or is interested in the business thereof, except as a policy holder. (69 Ohio L. 32, sec. 2.)

SEC. 272. The superintendent, when he has reason to suspect the correctness of any statement of an insurance company doing business in the state, whether incorporated in this state or not, or that its affairs are in an unsound condition, shall make, or cause to be made by some person by him for that purpose appointed, an examination into the affairs of such company; and such company, its officers and agent, shall submit their books and business to such examination, and in every way facilitate the same; . . . (75 Ohio L. 576.)

SEC. 274. When it appears to the superintendent, from examination, or otherwise, that the assets of any life insurance company, organized under the laws of the state, are insufficient to reinsure its outstanding risks, as provided by this chapter, or that the assets of any joint stock insurance company other than life, organized under the laws of this state, after deducting therefrom all actual liabilities and a reinsurance fund equal to fifty per cent of the whole amount of premiums on all unexpired risks and policies, are reduced twenty per cent or more below the capital stock required by law, he shall require the officers thereof to direct the stockholders to pay in the amount of such deficiency, within such period as he designates in such requisition; and, after the superintendent issues his requisition calling for a sum to be paid by the stockholders of any company, amounting to or exceeding forty per cent of the capital, it is unlawful for the company to issue any new policies or transact any new business until the superintendent of insurance issues to such company a license, authorizing it to resume business, or until the court has rendered its decision in the case, as herein provided; but in case the requisition calls for a less amount than forty per cent of the capital, and the officers of the company, in accordance with the requisition, direct the stockolders to

pay the amount required for making up the capital, and so signify to the superintendent, then it will be lawful for the company to continue business as before the issuing of the requisition, for the term of thirty days from the date thereof; and, if at the expiration of the thirty days, any portion of the requisition of the superintendent remains unpaid, the company shall not issue any new policies, or transact any new business until authorized by the superintendent as aforesaid. (70 Ohio L. 165, sec. 9.)

SEC. 275. In case of default on the part of the company to comply with such requisition, the superintendent shall communicate the fact to the attorney-general, who shall apply to the court of common pleas of the county in which the principal office of the company is located for an order requiring such company to show cause why the business thereof should not be closed, and shall give to the company such notice of the pending of such application as the court directs, and the court shall thereupon proceed to hear the allegations and proof of the respective parties; or the court shall have power to refer the application of the attorney-general to a referee, to inquire into and report upon the facts stated therein: In case it appears to the satisfaction of the court that the assets of the company are not sufficient as aforesaid, or that the interests of the public so require, the court shall decree a dissolution of the company and a distribution of its effects; and any transfer of the stock of a company made during the pendency of such investigation shall not release the party making the transfer from his liability for losses which have occurred previous to the transfer. (70 Ohio L. 165, sec. 10.)

SEC. 282. There shall be paid by every insurance company doing business in this state, to the superintendent of insurance, the following fees: For filing a copy of its charter or deed of settlement, twenty-five dollars; *for filing each statement, twenty dollars;* for each certificate of authority, or license and certified copy thereof, two dollars; for each copy of a paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of office and certifying any paper, one dollar; all of which fees shall be

paid by the superintendent into the state treasury. . . . (69 Ohio L. 32, sec. 17.)

SEC. 284. Every insurance company doing business in this state shall publish, at least once a year, in some newspaper of general circulation, in every county where such company has an agent, a certificate from the superintendent of insurance that such company has, in all respects, complied with the laws of the state relating to insurance; and the certificate shall also contain a statement, under the oath of the president or secretary of such insurance company, of the actual amount of paid-up capital, the aggregate amount of assets and liabilities, together with the aggregate income and expenditures of such company for the year preceding the date of such certificate; a copy of which certificate shall be filed in the office of the recorder in each county in which the company has an agent, and for every such paper the recorder shall receive the sum of ten cents. No other publication than as herein provided for is required of such companies. (69 Ohio L. 32, secs. 19, 21.)

SEC. 288. Any person who violates any of the provisions of this chapter, shall be fined not more than one thousand dollars, or imprisoned not more than six months, or both. Any corporation, company or association violating any of the provisions of this chapter, shall be fined not more than one thousand dollars nor less than one hundred dollars, to be recovered by action in the name of the state, and on collection paid into the county treasury for the benefit of the common school fund. (82 Ohio L. 138.)

SEC. 289. The provisions of this chapter shall apply to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance; and it is unlawful for any company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contract substantially amounting to insurance, or in any manner to aid therein, in this state, without first hav-

ing complied with all the provisions of this chapter. (69 Ohio L. 32, sec. 25.)

SEC. 3232. Corporations created before the adoption of the present constitution, and which have not, by election or some other act, come to be governed by laws since passed, shall be governed and controlled by the laws then in force, and the valid modifications thereof since or herein enacted; other corporations now existing or hereafter created shall be governed and controlled by the provisions of this title.

SEC. 3233. A corporation created before the adoption of the present constitution, and now actually doing business, may accept any of the provisions of this title, and when a certified copy of such acceptance is filed with the secretary of state, so much of its charter as is consistent with the provisions of this title is hereby repealed. (50 Ohio L. 274, sec. 71.)

SEC. 3234. Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, shall thereby and thereafter be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise; provided, that any fire insurance company so created, complying with the requirements of sections three thousand six hundred and fifty-four, and three thousand six hundred and fifty-five, or of any police regulation contained in chapter eleven of this title or in chapter eight of title three, part first, shall not be deemed to have consented, and shall not be affected by the provisions of this section by reason of such compliance.

SEC. 3637. No company organized under this chapter, or incorporated under any law of this state, for the purposes provided in section thirty-six hundred and thirty-two, shall invest its capital, or any part thereof otherwise than in—1. United States bonds; 2. Ohio state bonds; 3. Bonds of a county, township, or municipal corporation in this state, issued in conformity with law; 4. Bonds and

mortgages on unincumbered real estate within the state, worth fifty per cent more than the sum loaned thereon, exclusive of buildings; 5. The stock of any national bank located in this state, organized under the provisions of an act of congress entitled "An act to provide a national currency, secured by the pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25, 1863, and acts amendatory thereof and supplementary thereto; or, 6. First mortgage bonds of railroads within this state, upon which default in the payment of the interest coupons has not been made within three years previous to the purchase thereof. (70 Ohio L. 147, sec. 6.)

SEC. 3638. Funds accumulated in the course of business or surplus money over and above the capital stock of a company, may be loaned on or invested in the above-named securities, or, 1. Bonds and mortgages on unincumbered real estate within this state worth fifty per cent more than the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some company authorized to do business in this state, and the policy is transferred to a company making the investment; 2. Bonds of any state of the United States; 3. Stocks, bonds, or other evidences of indebtedness of any solvent, dividend paying institution incorporated under the laws of this or any other state, or of the United States except its own stock; or, 4. Negotiable promissory notes maturing in not more than six months from the date thereof, secured by collateral security through the transfer of any of the classes of securities above described in this or the preceding section, with absolute power of sale within twenty days after default in payment at maturity. (70 Ohio L. 147, sec. 6.)

SEC. 3639. No company shall own more than one-fourth of the capital stock of any national bank, nor invest in nor loan on the stocks any bonds, both included, of any railroad company to an extent exceeding one-tenth of its own capital, nor in the aggregate shall the investment in and loan on all railroad property exceed one-fourth of its capital; not more than one-half of its capital shall be

loaned on mortgage of real estate, as above provided for the investment of capital, and not more than one-tenth of the capital actually existing of any company shall be invested in a single mortgage; the current market value of all such stocks, bonds, or other evidences of indebtedness as above mentioned, in which the accumulations or surplus money over and above the capital stock of any insurance company may be loaned or invested, shall be at all times during the continuance of such loans at least twenty per cent more than the sum loaned thereon; and if any investment or loan be made in a manner not authorized by this chapter, the directors who make or authorize the same shall be personally liable to the stockholders for any loss occasioned thereby; but insurance companies organized under the laws of this state, now doing business, shall not be compelled to change any investment made in accordance with the acts heretofore passed regulating such companies. (70 Ohio L. 147, sec. 6.)

SEC. 3654. The president or vice-president and secretary of each insurance company organized under any law of this or any other state shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of such company on the 31st day of December, then next preceding, exhibiting the following facts and items, and in the following form, namely:

First. The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second. The property or assets held by the company, specifying:

1. The value of the real estate owned by such company, where it is situated, and the value of buildings thereon.

2. The amount of cash on hand and deposited in banks to the credit of the company specifying in what banks the same is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mort gages, which are the first lien on real estate, and on which there is less than one year's interest due.

5. The amount of loans on which interest has not been paid within one year.

6. The amount due the company on which judgments have been obtained and the cash value thereof.

7. The amount of stocks in this state, the United States, of any city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid, and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies are issued.

12. The number of policies in force.

13. The amount insured under all policies in force.

14. The amount of premiums received thereon.

15. The amount and a description of all other assets.

Third. The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

4. The amount of dividends declared and due and remaining unpaid.

5. The amount of dividends, either cash or scrip, but not due.

6. The amount of money borrowed, and the security given for the payment thereof.

7. The amount required for re-insurance, being in

stock companies a sum equal to fifty per cent of the whole amount of premiums on unexpired risks and policies, and in mutual companies a sum equal to fifty per cent of the cash premiums received on unexpired risks and policies.

8. The amount of all other existing claims against the company.

Fourth. The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Fifth. The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid for taxes.

5. The amount of all payments and expenditures.

6. Amount of scrip dividend declared.

* * * (90 Ohio L. 159.)

SEC. 3655. The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes which originally formed the capital, and also what proportion of such notes is still held by the company and considered capital; and every company organized under any law of this state which fails to make and deposit such statement, or to reply to any inquiry of the superintendent, with respect to such statement, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter

to transact any business of insurance, to be recovered by action in the name of the state, and, on collection, paid into the state treasury for the benefit of the state common school fund; and the attorney-general on the request of the superintendent of insurance, shall institute such action against any company so delinquent in the court of appropriate jurisdiction in Franklin county, or in the court of appropriate jurisdiction of the county in which said company is located or has its principal place of business, as he prefers. (84 Ohio L. 5.)

SEC. 3661*a*. No insurance company, organized under the laws of this state, or admitted to do business in this state, shall in any public advertisement, card, or circular, include in any statement of assets, any item of value, of a class or character not admitted by the superintendent of insurance of this state in the annual reports of said companies. And every such advertisement, card, or circular, containing a statement of assets, shall in all cases contain also a full statement of all the liabilities of said company, including the re-insurance reserve, which in no cases shall be less than fifty per cent on the gross premiums received on all unexpired risks. (77 Ohio L. 185.)

SEC. 3661*b*. Any violation of this act, after the second notice from the superintendent of insurance of this state, shall render such company liable to a fine of one thousand ($1,000) dollars, and each subsequent violation to a similar fine; to be recovered for the benefit of the common school fund of the county, in an action to be instituted by the prosecuting attorney, in the name of the State of Ohio, against said company. (77 Ohio L. 185.)

Office Supreme Court U. S.
FILED.
MAR 3 1894
JAMES H. McKENNEY,
CLERK.

(15,435.)

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1051.

THE EAGLE INSURANCE COMPANY OF CINCINNATI,

AND

JOHN K. GREEN AND SAMUEL P. POST,

PRESIDENT AND SECRETARY OF THE SAID EAGLE INSURANCE CO.,

Plaintiffs in Error,

VS.

THE STATE OF OHIO, ON THE RELATION OF W. H. KINDER, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

J. K. RICHARDS,

Attorney General of the State of Ohio.

COLUMBUS, OHIO.
JOURNAL-GAZETTE PRINTING HOUSE.
1894.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The original action was one in mandamus, brought in March, 1893, by the State of Ohio, on the relation of the Superintendent of Insurance of Ohio, in the Supreme Court of Ohio, to compel the Eagle Insurance Company of Cincinnati, and its President and Secretary, to comply with the requirements of Sections 3654 and 3655 of the Revised Stat-

utes of Ohio, and prepare and file with the Superintendent of Insurance, a statement of the condition of the company on December 31, 1892.

Under the Constitution of Ohio, adopted in 1802, corporations might be created by special acts, which constituted contracts between the State and the corporation. The present Constitution, adopted in 1851, provides, Article 1, Section 2: "No special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly;" and, Article 13, Section 2: "Corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed."

Section 3654 provides, that the president or vice-president and secretary of each insurance company organized under any law of this State shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the Superintendent of Insurance, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting in detail, under items specified in the statute, the following information:

First—The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second—The property or assets held by the company.

Third—The liabilities of the company.

Fourth—The income of the company during the preceding year.

Fifth—The expenditure during the preceding year.

The details required to be specified under each of these several heads appear in the full section, which, with Section 3655, is printed in the appendix to this brief.

By other sections, foreign insurance companies doing

business in Ohio, are required to make like report to the Superintendent of Insurance.

The Eagle Insurance Company was organized under a special act of the General Assembly of Ohio, passed March 22, 1850 (48 O. L., 498 to 501), prior to the adoption of the present Constitution. (This act is printed in full in the appendix to this brief.)

The Company, and its President and Secretary, refused to comply with the law mentioned, requiring all insurance companies to report annually to the Insurance Department of Ohio, claiming that no power was reserved in the act creating the company to alter, amend or repeal its charter, and that, if Sections 3654 and 3655 should be held to impose any duty upon the company or its officers, the obligation of the contract, created between the company and the State by its charter, would be impaired, in violation of Section 10, of Article 1, of the Constitution of the United States.

The petition set out the foregoing facts, with some formal allegations, and concluded with the prayer that a writ of mandamus might issue, compelling a compliance on the part of the company, and its President and Secretary, with the provisions of the sections mentioned.

The answer filed on the part of the company, and its President and Secretary, contained two defenses.

The first defense admits the averments of fact in the petition, but denies that Sections 3654 and 3655 apply to, or impose any duty on the company or its officers. No power was reserved, it is averred, in the charter to alter or amend it, and it is insisted, that if the company is subjected to the requirements of Sections 3654 and 3655, the obligation of the contract embraced in the charter, will be impaired, in violation of the Constitution of Ohio and the United States.

It is finally averred that the company is doing a prosperous business in strict compliance with its charter.

The second defense sets out the plea of *res judicata*. It is stated, that in July, 1886, the Attorney-General of Ohio, brought suit in the Court of Common Pleas of Franklin County, Ohio, the State being plaintiff, and the defendant, The Eagle Insurance Company, defendant, to recover the penalty of $500, under Section 3655, for the failure of the company to file a statement under Section 3654, showing the condition of the company on the 31st of December, 1885. To this petition the company filed an answer, setting forth that it was incorporated under the act of March 22, 1850, and was not subject to the provisions of Sections 3654 and 3655. The State demurred to this answer, and on the 1st of February, 1887, the demurrer was overruled and the State not desiring to plead further, the action was dismissed. This judgment of the Common Pleas was affirmed in the Circuit Court.

To this answer, and each of its defenses, the plaintiff demurred.

The Supreme Court of Ohio, after full hearing and careful consideration, in an opinion delivered by Judge DICKMAN, a copy of which is set out in the Record, page ——, sustained the demurrer to the answer, and granted a preemptory writ of mandamus, compelling the company and its officers to file the statement required by Sections 3654 and 3655.

Thereupon a writ of error was sued out in this Court to review the judgment of the Supreme Court of Ohio.

The gist of the decision of the Supreme Court of Ohio in this case, is contained in the following syllabus, which, under the rule in Ohio, is prepared by the Court, and contains, in concise form, the law of the case.

SYLLABUS.

1. A fire insurance company, organized under a special charter before the adoption of the present constitution, is subject to such reasonable regulations as the legislature may prescribe by general law, and the public good may require,—such regulations serving to secure the ends for which the company was created, and not being repugnant to the franchises and privileges granted in its charter.

2. A fire insurance company thus incorporated, will not be exempt from a compliance with the requirements of Sections 3654 and 3655 of the Revised Statutes, to prepare and deposit annually in the office of the Superintendent of Insurance, a statement of its condition, unless such exemption appear to have been clearly granted by its charter.

3. Where a judgment has been rendered by a Court of competent jurisdiction, in favor of one of the parties to an action, for the reason that, otherwise, under an existing law, a charter right of such successful party might be involved in danger, the judgment should not be conclusive in a subsequent action between the same parties, when the law has been so amended that such right is thereby assured."

Upon the question raised in the second defense, a question turning upon the true construction of certain Ohio statutes, and the effect of certain amendments thereof, I take it, that, under the well settled rule of this Court, the decision of the Supreme Court of Ohio must be accepted as final and conclusive.

Under the first defense, the chief contention by the defendants below was, not that the filing of an annual report would in itself interfere with the enjoyment of any of the charter rights of the insurance company; but that, if the company submitted to this regulation, it would have to comply with other regulations of the general insurance laws of Ohio, prescribing how companies shall invest their assets.

Or the company, by acting in accordance with Sections

3654 and 3655, would, by virtue of the provisions of Section 3234, be deemed to have consented and be held to be a corporation under the present Constitution, and thus waive and lose all special rights and privileges under its charter.

The decision of the Supreme Court of Ohio as to the construction of Ohio statutes on these points, settles these questions and removes them from the field of controversy.

In *Bucher* vs. *Cheshire Railroad Company*, 125 U. S., 582, Mr. Justice MILLER states the rule in these words: "It has been held by this Court that the decisions of the highest court of a State in regard to the validity or meaning of the Constitution of that State, or its statutes, are to be considered as the law of that State within the requirement of this section. In *Leffingwell* vs. *Warren*, 2 Black, 599, this Court said, in regard to the statute of limitation of a State, 'The construction given to a statute of a State by the highest tribunal of the State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.'"

The Supreme Court of Ohio has decided that the regulation compelling the filing of the report stands alone; that it does not follow, because the company must report annually to the Insurance Department of Ohio, that it must also invest its assets as prescribed in the general insurance laws; on the contrary, that one object of the report is to ascertain whether the company is investing its assets in accordance with the provisions of its charter.

The Supreme Court of Ohio has further decided, that the filing of the statement will not, under Section 3234, be deemed a waiver of any charter rights or a consent to operate under the present Constitution and the general insurance laws of the State.

The only question, then, which remains for this Court to

determine—the only Federal question involved, is, whether to compel this company to file an annual statement of its condition with the Superintendent of Insurance of Ohio, in compliance with the law of the State applying in terms to all insurance companies, will impair the obligation of the contract made by its charter between the State and itself.

ARGUMENT.

THE CHARTER.

No obligation of the contract created by the charter is impaired, because the act of March 22, 1850, neither expressly, nor by implication, exempts the company from the duty of filing a statement of its condition with the proper state officer, should the State so require; but, on the contrary, by implication, subjects it to such requirement, which is calculated to further the ends of the incorporation, and secure the observance of the conditions on which the grant was made.

FIRST—*Rule of construction of a charter or grant. The reservation of control need not be expressed, but exemption from control must be expressed; for what is not granted in terms or by necessary implication is reserved to the State.*

The charter of this company grants it various powers and prescribes various regulations for the conduct of its business; it fixes the capital stock and states how many shares

must be subscribed and paid, or secured to be paid, before the company can transact business; it gives the management of its affairs to a board of seven directors; empowers it to insure certain kinds of property; authorizes it to invest its capital stock "in such a way as the directors shall deem best for the safety of the capital and the interest of the stock-holders"; permits it to change the character of this investment under certain restrictions; gives the directors power to declare such dividends "as shall not impair or in any wise lessen the capital stock"; prescribes how transfers of stock shall be made, how policies may be issued, how subscriptions shall be received, directors elected, meetings called, and, finally, authorizes the President and directors to "ordain and establish such by-laws and regulations as shall appear to them necessary for regulating and conducting the concerns of such institutions, *not being contrary to nor inconsistent with this act, the Constitution or laws of this State*, and of the United States; they shall keep full, fair and correct entries of their transactions, which shall be at all times open to the inspection of all stockholders;" *but the charter nowhere says the company shall never be required to make a statement or exhibit the condition of its affairs to the State, or that it shall not be subject to proper legislative control.*

The claim of the company is, that the right of requiring a statement should have been reserved in the charter in order to subject the company to the regulations contained in Sections 3654 and 3655. I insist that the cases are clearly and conclusively against this claim.

It is not the *reservation of control* that must be expressed in the grant, but the *exemption from control* that must be so expressed. A grant of corporate powers is never construed, where ambiguity exists, in favor of the corporation and

against the public; it is always construed in favor of the public and against the corporation. In every grant the public give away some of their rights, or, rather, the Legislature gives away some of the rights of the public, and the rights thus given must be given in plain terms or by necessary implication. Nothing that belongs to the public is *presumed* to have been given, nothing is treated as given that was not given; no franchise, no privilege, no right of exemption will pass by silence. Let me refer to a few of the many cases on this point.

In *Providence Bank* vs. *Billings*, 4 Peters, 515, the bank had been incorporated with the powers usually given to such institutions. The charter was silent as to taxation. The Legislature imposed taxes. The bank resisted, but the Supreme Court, the great Chief Justice MARSHALL delivering the opinion, held the bank liable for the taxes as an individual would have been. He says (page 561, bottom):

"The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

This decision was rendered in the face of the argument, admitted to be true, that the right to tax includes the right to destroy, and that the power of taxation might be exercised so as to absorb the entire profits of the bank and render its franchises valueless; but the great expounder of the Constitution took the true ground—that corporations are liable to legislative control like individuals, except when expressly exempted.

In *Charles River Bridge* vs. *Warren Bridge*, 11 Peters, 544, Chief Justice TANEY elaborates on the rule for construing public grants, citing many cases, English and American, all to the effect that in grants by the public nothing passes by implication, and every doubt or ambiguity must be construed in favor of the State.

In the leading case of *Thorp* vs. *Railway Company*, 27 Vermont, 140, in which a railroad company was held subject to legislative control and required to maintain cattle-guards, although there was no reservation of the right of regulation by the State in the charter of the company, REDFIELD, Ch. J., learnedly reviews the cases on the subject of legislative control of corporations, and says (p. 147):

"The defendant's charter required them to fence the road, but no express provision is made in regard to cattle-guards. There is no pretense of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless everything is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted."

Applying this to the case at bar, what franchise was granted to this insurance company which may not be enjoyed just as fully when the company files the statement in question, as when it does not? All insurance companies created since the adoption of the present Constitution, and a number of those created before, file this statement annually, and they carry on as profitable an insurance business as this company does. There is not a single right or privilege granted in the

charter, with the enjoyment of which a compliance with the provisions of Sections 3654 and 3655, will conflict.

But Judge REDFIELD proceeds: "The language of TANEY, C. J., is in my judgment eminently just and conservative: 'The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations.' The conclusion of this eminent judge and learned jurist is, that no claim in any way abridging the most unlimited exercise of legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant, in terms, or by necessary implication."

In the *Delaware Railroad Tax Case*, 18 Wallace, 206, 225, Mr. Justice FIELD lays down the rule in these words: "All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. *And with special force does the principle upon which the rule rests, apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise.*"

In *Fertilizing Company* vs. *Hyde Park*, 97 U. S., 659, in which it was unsuccessfully claimed, that the enforcement of an ordinance militating against the company's business as a nuisance, was an impairment of the obligations of its charter, Mr. Justice SWAYNE states the rule in these terse terms: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable

doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

To the same effect, is the language of Mr. Justice FIELD, speaking for this Court, in *Georgia Banking Company* vs. *Smith*, 128 U. S., 174, 182: "The exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistent with the reservation of the power by the State;" and the language of Mr. Chief Justice FULLER, in *Yazoo Railroad Company* vs. *Thomas*, 132 U. S., 174, 185: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*."

Finally, in two recent cases in the Supreme Court of Ohio, the rule is laid down in concise and lucid language.

Thus, in *State ex rel.* vs. *The Columbus Gas Light and Coke Co.*, 34 O. S., 572, where the charter of the company, granted prior to the adoption of the present Constitution, contained no provision as to the price to be charged for gas, or on the subject of meters, it was held, that the company was subject to the provisions of the act of March 9, 1867, restricting the price to be charged for the use of meters. Judge WHITE (p. 581) says: "In the present case, it is claimed on the part of the defendant, that no right is reserved, on behalf of the public, to control the price of gas, or the amount to be charged for the use of meters; but that

this power, under the charter, rests exclusively in the defendant."

"Before this right of exemption from legislative control can be asserted, the right must appear to have been clearly granted by the charter. 'The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law." *Perrine* vs. *Canal Co.*, 9 Howard, 172, 192."

Judge WHITE analyzes the charter granted the gas company, which in many respects is similar to the charter in question in this case. In that charter, as in this, the directors were authorized to make by-laws and rules regulating all matters pertaining to the company, *not inconsistent with the Constitution and laws of this State and of the United States.* From this language, Judge WHITE draws the conclusion, that the company, *instead of being exempted, is expressly subjected*, to the laws of the State in matters proper for public control. He says (bottom page 581): "*This provision is not limited to laws then in force, but extends also to such laws as may be passed in the future.*" Is not this language in point?

Again, in *Zanesville* vs. *Gas Light Company*, 47 O. S., 1, 31, where the charter, granted before the present Constitution, contained no reservation of the right to alter or amend it, and was silent as to the rates at which the company might be required to furnish gas, the corporation was held subject to existing regulations fixing the price of gas, the Court, by Judge MINSHALL, using this language (top p. 31):

"Such silence cannot, however, be construed into a grant of the franchise to fix its own rates. A franchise must be created by express terms and cannot be inferred from the mere silence of the charter. So that, whilst in this case, the

company may claim to possess the rights of a natural person, it cannot be claimed to be clothed with any greater rights than such person would have under the same circumstances."

An examination of the charter in the light of this rule of construction, will satisfy the Court, that it does not, either in terms, or by necessary implication, exempt this insurance company from the duty of filing the statement required by the law of Ohio. There is no language in the act which, by even a strained construction, would warrant such exemption. But, going further, on the contrary, all the implications of the charter lead to the conclusion, that the power to exact this statement remained and remains in the State. A closer examination of the charter with a view of ascertaining, not only what powers were conferred, but *what duties were imposed*, on this insurance company, will make clear the interest the State has in the way its affairs are conducted, and the right the State has to require it to make public disclosure of its condition.

SECOND—*The charter imposes on this insurance company certain duties, which gives the public an interest in the conduct of its affairs, and subjects it to reasonable regulations, calculated to secure the ends for which the company was created.*

This company is an insurance company. That the matter of insurance is of public interest is apparent from the amount and character of the legislation on the subject, not only in this State, but in all the States and in all countries. No fire insurance company created since the adoption of the present Constitution and operating on the stock plan, can do business without a capital stock of $100,000.00 paid up and invested. Foreign insurance companies must obtain a license

showing they have equal financial backing. A State department is created, having at its head the Superintendent of Insurance, charged with the duty (Section 268) of seeing "to the execution and enforcement of all laws relating to insurance." This includes *all* laws relating to insurance, as well laws passed before as since the present Constitution. All companies are required to report annually to the Superintendent, and he is empowered to make examinations of the companies. The contents of statements and the results of examinations are made public, so that all interested persons may know in what shape a company is. The necessity of publicity with regard to the affairs of insurance companies is apparent. The business of an insurance company is not confined to the neighborhood where its office is located and its officers known. It does business over a large territory. Its policy holders have no opportunity for personal investigation. They pay their money in advance, and in return receive a promise of the company to indemnify them against loss for a certain period. Whether the promise shall be kept or not depends largely on whether the company complies with the law regulating it, and does not abuse or misuse its franchises. The State alone can ascertain whether the company is operating lawfully, and put the policy holders in the way of obtaining this information. This is what the State seeks to do by the requirements of Sections 3654 and 3655. So far as old charter companies are concerned, this statement is not required for the purpose of subjecting them to all existing regulations on the subject of insurance, but of laying before the Superintendent and the public the facts which will show whether the company is obeying the law of its creation.

Take the charter of this company in connection with the statement required.

Section 2 of the charter fixes the capital stock at $100,000.00, which may be increased to $200,000.00; the shares, $100.00 each; $25.00 must be paid on each share at the time of subscription, the balance shall be subject to the call of the directors, and shall be secured by endorsed notes or other property. Four hundred shares must be subscribed, and paid or secured to be paid, before the company shall be competent to transact business. These are restrictions, duties imposed. In the statement required under Section 3654, the company is required to set forth the amount of the capital stock, specifying the amount paid and unpaid, and the amount of unpaid assessments on stock.

In Section 1 of the charter, the company is authorized to hold such real estate only as shall be necessary for the transaction of its business, or may be taken as security for, or in payment of a debt; and in the statement, it is required to set out the value of the real estate owned, where it is situated, and the value of the buildings.

In Section 6 it is provided, that it shall not be lawful "for said corporation to use or employ any part of their capital stock, money or other funds, in buying or selling goods, wares or merchandise, nor in the purchase of real estate, except as provided in the first section of this act, nor shall the said company trade in the business of exchange brokerage, or in any manner engage in the business or operation of banking;" and in the statement, by requiring a specific exhibit of the assets and liabilities of the company, means are afforded for seeing at a glance whether these prohibitions are observed by the company.

In Section 7 of the charter, it is provided, that only such dividends of the profits of the business of the company shall be declared as shall not impair nor in anywise lessen

the capital stock of the same. The statement requires the amount of dividends declared and due and remaining unpaid, the amount of dividends either cash or script declared but not due, and the amount of dividends paid during the year, to be severally set forth. These facts, with the assets and liabilities of the company, will put the Superintendent of Insurance in position to know whether this regulation is complied with.

Section 6761, of the chapter regulating proceedings in quo warranto, provides that an action may be brought against a corporation "when it has offended against a provision of an act for its creation," or "when it has misused a franchise, privilege or right conferred upon it by law," etc. The Superintendent of Insurance is sworn and charged to enforce all the laws relating to insurance. How can he tell whether an old charter company is or is not misusing its franchises and violating its charter, if no statement is required to be made, and no examination by him permitted?

In this connection, it is proper to call attention to the fact, that in the brief filed on behalf of the insurance company in the Supreme Court of Ohio, it was urged that the Superintendent of Insurance could protect the rights of the State and the public, by making an examination under Section 272, which empowers the Superintendent of Insurance, when he has reason to suspect the soundness of the condition of a company, to examine its affairs, and, if necessary, take steps to wind up its business. The object was to lead the Court to believe, that the company admitted it was subject to examination under Section 272, although refusing to report under Section 3654. These two sections, 3654 and 272, were passed for the same reasons and have in view the same end. This company, and other "Old Charter" companies,

took this view, for they refused to submit to examination under Section 272, just as they refused to file statements under Section 3654.

In support of this position, I refer the Court to the case of *Chicago Life Insurance Company* vs. *Needles*, 113 U. S., 574. In this case, the Auditor of State, who is Superintendent of Insurance in Illinois, acting under a statute passed years after the charter was granted the company, made an examination into its condition, found it to be insolvent and instituted proceedings to wind up its affairs, enjoining it in the meantime from transacting further business. Before the Supreme Court of the United States, the company insisted (see opinion, Mr. Justice HARLAN, bottom p. 579), that the obligation of the contract which the company had with the State, in its original and amended charter, would be impaired if the company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the Court, in certain contingencies, to suspend, restrain or prohibit insurance companies incorporated in Illinois from further continuance in business.

To this, Mr. Justice HARLAN replied (bottom p. 579): "This position cannot be sustained, consistently with the power which the State has, and upon every ground of public policy must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter; the right of the plaintiff in error to exist as a corporation, and its authority to conduct the business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established."

"Equally implied in our judgment is the condition, that the company shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S., 700, 768; *Com.* vs. *F. & M. Bank*, 21 Pick., 542; *Com. Bank* vs. *Miss.*, 4 Sm. & Marsh, 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted."

Again, on page 582, bearing upon the power of the State without any express reservation to that end in the charter, to subject it to regulations, Mr. Justice HARLAN says: "If the State had no such power, then the statutes under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible, that the State, which brought this corporation into existence for the purpose of conducting the business of life insurance, is powerless to protect the people against it, when its further continuance in business would defeat the object of its creation, and be a fraud upon the public, and on its creditors and policy holders?"

If it be urged that the Eagle Insurance Company is doing a lawful business, is solvent, etc., the answer is, there are old charter companies, and there will continue to be old charter companies, just as there are and will continue to be companies under existing laws, which are not solvent and are doing an illegal business, but the insolvent companies, the

companies which abuse their franchises, cannot be ascertained, unless all companies, solvent as well as insolvent, are required to file this statement. Hence, this regulation is necessary, in the language of Mr. Justice HARLAN, to protect the people and see to it that the company carries out the ends for which it was created.

THIRD—*A charter being a contract, privileges being granted by the State in consideration of benefits to accrue to the public from a proper use of the franchises given, the public has the right to know whether the company is discharging its duties and in good faith observing the corporate contract.*

The insurance company insists the charter created a contract. I admit that. But it was not a one-sided contract. The corporation did not get all, and give or agree to give nothing. The company was granted certain privileges; but these were granted in consideration of benefits expected to accrue to the public from their exercise. If certain rights were conferred, certain duties were imposed on the company. By accepting the charter the company agreed to discharge these duties, agreed to observe the obligations, and be responsible to the State for the misuse of its franchises. The State having the right to call the company to account for an abuse of the privileges granted, has a right to be informed how these privileges are being exercised. Without such information, without the power to compel its production, the public is powerless to enforce the obligations of the corporate contract and protect itself against the abuse of its privileges and the violation of its laws. The Legislature, which is the agent of the public, charged with the duty of protecting it against fraud or mismanagement on the part of corporations, did no more than was absolutely necessary, in requiring all insurance companies to file the statement in question.

The visitatorial power of the State, and the authority to make examinations and compel reports, was considered and sustained in the leading case of *Commonwealth* vs. *Farmers' & Mechanics' Bank*, 21 Pick., 542. RUFUS CHOATE and BENJAMIN R. CURTIS argued this case, and Chief Justice SHAW decided it. The bank was organized under a special charter. By a subsequent act, bank commissioners were appointed with authority to visit banks, examine their officers, and if the bank be found insolvent, institute proceedings to prevent it from continuing in business. The same defense was made as in all such cases, that the Legislature had not reserved visitatorial power over banks; that the grant was a power to do business, not while the corporation should proceed legally or with safety to the public, but so long as the grant remained in force.

The defense was overruled. Justice SHAW says (p 550): "The manifest object which the Legislature had in view, was to provide as far as practicable for the prevention and redress of the evils and mischiefs, both to the public and to individuals, proceeding from the violation of their charters by banks and from their insolvency. The object was to prevent their becoming dangerous to the public by their mismanagement and breach of laws, and to provide relief for their creditors, as far as possible, when they have become insolvent. When it is considered how important it is to all the great interests of the community, that banks should be managed uprightly and with integrity, and according to the rules of law prescribed for their regulation in their charters and by general laws, and how important it is that they should enjoy the confidence of the community, there seems to be no doubt, that the objects proposed are proper subjects for the exercise of legislative power."

There is not a word by this great Judge with respect to banks, that does not apply equally well to insurance companies.

And this clearly appears from the language of Mr. Justice STORY in the Dartmouth College case, wherein he places insurance companies with banks, in the class of companies whose "objects and policies partake of a public nature," and whose "uses may, in a certain sense, be called public."

"A bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and policies partake of a public nature. The same doctrine may be affirmed of *insurance*, canal, bridge and turn-pike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private." (4 Wheaton, 669, middle.)

Justice SHAW proceeds, speaking directly to the claim, that the obligation of the charter contract was impaired (bottom p. 556): "They are incorporated on many conditions, some express and some implied by law. The most obvious one is, that they will comply with the terms of their charter, one of which is, that they shall conduct their business according to banking principles and the rules of law. As they may violate the provisions of their charter and incur a suspension or forfeiture, there must be some mode prescribed for a judicial inquiry into the fact, whether they have so violated the terms of their charter, and for providing redress. * * * * The violation may be of such a nature as to affect the rights of great numbers, so that it may be considered an injury to the community at large, in which case it is more consistent with public safety and convenience, and entirely consonant to the whole course of the adminis-

tration of justice, to institute a process in the name, and under the authority of the government, bound as it is to provide security for its citizens."

Bearing upon the interest the public has in the proper conduct of the insurance company, let me quote an illustration given by Mr. Chief Justice WAITE in the decision in the *Sinking Fund cases*, 99 U. S., p. 722: "Take the case of an insurance company dividing its unearned premiums among its stockholders without laying anything by to meet losses, would anyone doubt the power of the state, under its reserved right of amendment, to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A Court of Equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a Court would compel it to do without legislation is not unreasonable."

From the foregoing, I submit it is clear,

That the charter of this insurance company does not, either in terms, or by necessary implication, exempt the company from the duty of filing the statement required;

That, on the contrary, all the implications of the charter lead to the conclusion, that the power to exact this statement remained and remains in the State, and that the duties im-

posed on the company by its charter give the public an interest in the proper conduct of its affairs, amply justifying this regulation, which is necessary to protect the people, and to secure the ends for which the corporation was created;

That, if the charter was a contract, it was a contract on the part of the company as well as of the State, the company agreeing, in consideration of the grant of privileges, to use its franchises properly, and for the promotion of the ends of its corporate existence, and that the public has a right to know, through these statements, whether the company is complying with the terms of its charter and conducting its business according to law.

This discussion thus far has been restricted to the contract embraced in the charter, and the respective rights of the insurance company and the State under and by reason of the grant of the charter. But there is a power in the State superior to all contract, personal, or property rights, the power of the State to pass necessary measures, to provide for the public safety and to further the common welfare, which brings us to

THE POLICE POWER OF THE STATE.

To prevent fraud or mismanagement in the operation of insurance companies, and to protect the public against deception and loss thereby, the State has authority, under the police power, to require all companies doing an insurance business within its limits, whether incorporated in this State prior to or since the adoption of the present Constitution, to make, annually, public disclosure of the condition of their affairs, by filing the statements mentioned.

All rights held and enjoyed by individuals and by corporations, even the fundamental rights of liberty and property, are not absolute in character, but must be held and enjoyed subject to the proper demands of society and subservient to the common welfare. Included in the general grant of legislative power, is what is termed the police power of the State. "By this police power of the State," says Judge REDFIELD, in the case I have cited (bottom page 150), "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State, of the perfect right in the Legislature to do which no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question." He then proceeds to decide, that railway corporations are also subject to this power; and if railway corporations, then also insurance companies, for the reasons I shall state later.

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified his title may be, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the equal enjoyment of their property, nor injurious to the rights of the community. All property is held subject to these general regulations which are necessary to the common good and welfare." Chief Justice SHAW, 7 Cushing, 53.

"All rights are held subject to the police power of the State. Whatever differences of opinion may exist as to the extent and boundaries of the police power, there seems to be no doubt that it does extend to the protection of the lives,

health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot by any *contract* divest itself of the powers to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*." Mr. Justice BRADLEY, in *Beer Company* vs. *Massachusetts*, 97 U. S., 25, 33.

To the same effect, our Supreme Court has spoken in *Palmer* vs. *State*, 39 O. S., 238: "The Constitution of Ohio provides, that private property shall ever be held to be inviolate, but subservient to the public welfare, and in vesting the legislative power of the State in the General Assembly, full power is given, by the Constitution, to enact such judicious and reasonable laws as, in the judgment of the Legislature, may be necessary for the purpose of preventing any person from using his own property, or rights, in such a way as to injure the community, or individuals."

But it may be insisted, that while individuals and property are subject to the police power, contract rights held under charters are sacred, because of the constitutional prohibition against a State passing laws impairing the obligation of contracts. The cases of *Thorpe* vs. *Railway Company*, and *Beer Company* vs. *Massachusetts*, from which quotations have been made, were cases affecting corporate rights. Upon authority, there is no distinction between the rights of individuals and corporations in respect of the police power.

Says Judge COOLEY, Constitutional Limitations, (bot. p. 716): "The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the States passing any laws impairing the obligations of contracts, have been frequent and varied; and it has been held without dissent, that this clause does not so far

remove from State control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." (Citing cases.)

Respecting the claim, that corporations are exempt from the operation of the police power because of their contract rights under their charter, and that the slightest police regulation operates as a restriction of the corporate franchise, and hence impairs the obligation of a contract, TIEDEMAN says, in Limitations of Police Power, page 576: "Such a construction of the operation of this constitutional provision is not only scientifically absurd, but is in violation of the ordinary rules of constitutional construction, which provide for a strict construction of all grants by the State to the individual. Apart from the question whether the State can barter away its police power, the intention of a Legislature to place a private corporation beyond the reach of the police power of the State, to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted, is so manifestly unreasonable, that we cannot suppose the Legislature so intended, unless this extraordinary privilege is expressly grant-

its officers for all this. He has no chance of personal investigation, no opportunity of personal acquaintance. Unscrupulous men can easily swindle the public by putting out false or misleading statements of the condition of the company they happen to be operating, the circular being not a personal one, but simply issued under the name of the company; or, if the company is solvent at the start, they can rob the policy holders by failing to maintain a proper reserve, by declaring illegal dividends, by converting to their own use unearned premiums, by even appropriating the assets—in short, by gutting the company and still holding it out as solvent. They can do this unless the State interferes to protect the public, and requires the company and its officers to file official statements, under oath, of its condition, and makes it subject to examination by the Superintendent of Insurance. This is what the State has done, for the best of reasons, by enacting the sections in question.

That this company, the Eagle Insurance Company, is solvent, and is doing a lawful and prosperous business, affords no criticism on the necessity of the law. The law was not intended for solvent so much as insolvent companies. A solvent company which is being operated legally has nothing to fear from filing this statement. An insolvent or swindling company has everything to fear from filing this statement. There are charters of insurance companies which have been peddled around this State for the purpose of swindling the public. Pretended companies operate under so-called old charters only and solely because they are exempt, or think they are exempt, from filing this statement. If they had to file this statement, they would not operate, because they could not operate. To make them tell the truth about themselves would kill them. Insisting they are beyond the reach

of law, and working in the dark, these companies, by professing to furnish cheap insurance, prey upon the poor and ignorant,—the very class having most claim on the State for protection,—and take their money, but give them nothing in return.

The admitted reason for the refusal of certain old charter companies to file this statement being, that they cannot make public their condition and continue to transact business, what need of further argument in favor of the necessity of not only passing but enforcing this legislation!

The financial condition of the Eagle Insurance Company has no pertinency in this inquiry; it is the policy of the law alone that is in question. A man required to submit to sanitary regulations could hardly claim that the law which compelled him to remain at quarantine was an arbitrary infringement of his constitutional rights, because there was no disease on board his ship. See *State* vs. *Addington*, 77 Mo., 116; *Powell* vs. *Commonwealth*, 114 Penn., 265, 280; *Powell* vs. *Pennsylvania*, 127 U. S., 678, 684.

SECTION 3234.

(As Amended March 8, 1892, 89 O. L., 73.)

The amendment of March 8, 1892, to Section 3234, recognizes the requirements of Sections 3654 and 3655 as police regulations, and expressly provides, that a compliance therewith shall not divest a fire insurance company created before the adoption of the present Constitution of any vested rights under its charter.

Section 3232, being the first section of the title of the Revised Statutes of Ohio regulating corporations, reads:

"Corporations created before the adoption of the present Constitution, and which have not, by election or some other act, come to be governed by laws since passed, shall be governed and controlled by the laws then in force, *and the valid modifications thereof since or herein enacted*; other corporations now existing or hereafter created shall be governed and controlled by the provisions of this title."

Section 3234 provides: "Corporations created before the adoption of the present Constitution, which take any action under or pursuant to this title, shall thereby and thereafter be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present Constitution, and the laws passed in pursuance thereof, and not otherwise."

To this broad provision, there was, prior to the amendment of March 8, 1892, but one exception: "Provided, that any insurance company so created, complying with the requirements of Section three thousand six hundred and fifty-five, shall not be deemed to have consented, and shall not be affected by the provisions of this section by reason of such compliance."

Following the rule *expressio unius exclusio alterius*, certain old charter companies insisted, that since Section 3654, and not 3655, provides for the filing of the annual statement, if a company should file an annual statement and thus comply with Section 3654, it would, under the broad language of Section 3234, lose its special rights under its charter, and become a corporation under the present Constitution and laws.

Accordingly, at the suggestion of an old charter company, which desired to secure the standing, which the filing of this statement and the supervision of the Superintendent

of Insurance over its operations would give it, the act of March 8, 1892, was passed. This act amends Section 3234, extending the provisio, so that it now reads thus: "Provided, that any fire insurance company so created, complying with the requirements of Section three thousand six hundred and fifty-four, and three thousand six hundred and fifty-five, or of any police regulation contained in chapter eleven of this title, or in chapter eight of title three, part first, shall not be deemed to have consented, and shall not be affected by the provisions of this title by reason of such compliance."

After this amendment the "old charter" company here referred to filed its statement. The necessity of the amendment explains the ground of the decision of the Common Pleas and Circuit Courts of Ohio in the suit in 1886 for penalties, set up below in the second defense as a plea in bar in this case.

The Supreme Court of Ohio properly decided that the judgment in the suit brought in 1886 to recover a penalty, was no bar to this action, because neither the parties, the cause of action, the facts, nor the law was the same in that as in this suit.

In that suit, the State was the plaintiff and the insurance company alone the defendant; in this suit, the State, on the relation of the Superintendent of Insurance, is plaintiff, and the insurance company and its president and secretary, defendants. In that suit, the cause of action was the failure of the company to file a statement of its condition on the 31st of December, 1885; in this suit, the refusal to file a statement of its condition on December 31, 1892. That suit was to recover a penalty, this is to enforce a duty. When that suit was decided, Section 3234, as I have just stated, only exempt-

ed from its provisions a fire insurance company complying with the requirements of Section 3655; now, since the act of March 8, 1892, the proviso is extended so as to exempt expressly any fire insurance company complying with the requirements of Sections 3654 and 3655.

Since this amendment, there is no valid excuse for any fire insurance company refusing to file this statement. I am satisfied it is only out of abundance of caution that the Eagle Insurance Company insists on the decision of the Court, and that, as soon as the Court decides that the filing of this statement will not interfere with or divest it of any of its charter rights, it will cheerfully and with promptitude comply with the law.

Before the passage of this amendment, while the charter of this company did not exempt it from compliance with such a requirement when made by the State, but, on the contrary, impliedly subjected it to such regulations, and while an observance of its charter contract on the part of this insurance company could be secured in no other way than by exacting such disclosures of its condition, nevertheless, there remained the doubt, that if the company should comply with the regulations and file a statement under Section 3654, it might be deemed, because of the explicit language of Section 3234, to have consented to be a corporation under the existing Constitution and laws, and thereby lose its charter rights. But now, this doubt is removed, and all things—the terms of the charter, the rights of the State under it, considerations of public policy, and the positive provisions of the statute, urge the Court to decide this case in favor of the State, and thereby bring all insurance companies, old charter as well as new charter, domestic as well as foreign, under the eye of the State and within reach of its arm.

This case was brought, and is regarded in Ohio, as a test case upon the question whether an insurance company organized prior to the adoption of the present Constitution, must report to the Insurance Department. Directly after the decision of the Supreme Court of Ohio in this case, sustaining the authority of the State over these companies, not less than eight or ten so-called "Old Charter" companies went out of business. The public disclosure of their condition, then for the first time had showed gross fraud and mismanagement. They were swindling concerns. They were able to operate only because they thought themselves exempt from disclosing their condition to the Insurance Department. The prospect of publicity was fatal to them. This predicted result of the decision of the Supreme Court of Ohio, speaks stronger than any argument in favor of the wisdom of that decision, and the absolute necessity, in the interests of the public, of compelling all insurance companies to report to the Insurance Department.

Respectfully submitted,

J. K. RICHARDS,
Attorney-General of Ohio.

February 24, 1894.

APPENDIX.

AN ACT

TO INCORPORATE THE EAGLE INSURANCE COMPANY OF CINCINNATI.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That George Crawford, Timothy Griffith, Isaac Copelen, William Wood, Henry Kesler, Henry Brackman, George M. Herancourt, and the subscribers of the stock of this association, and their successors, shall be and are hereby declared to be a body politic and corporate, by the name and style of the Eagle Insurance Company of Cincinnati, and in that name shall be capable in law to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity, and elsewhere, with full authority to acquire, hold, possess, occupy and enjoy, and the same to sell, convey and dispose of all such real estate as shall be convenient and necessary for the transaction of its business, or which may be conveyed in said company for the security or in payment of any debt which may become due and owing to the same, or in satisfaction of any judgment of a court of law or any order or decree of a court of equity in their favor, and make and use a common seal, and the same to alter and renew at pleasure, and generally to do and perform all things relative to the object of this association.

SEC. 2. That the capital stock of this association shall be one hundred thousand dollars, which may be increased at the pleasure of the majority of the stockholders to two hundred thousand dollars, divided into shares of one hundred dollars each. At the time of subscribing, there shall be paid on

each share twenty-five dollars, and the balance on each share shall be subject to the call of the directors, and shall be secured by endorsed notes payable on demand, or other property or stocks, to be approved by the board of directors. Moreover, if at any time the directors shall deem any such security insufficient, it shall be their duty to require additional security on such notes or obligations by them held for the payment of stocks as they shall deem best; and any stockholder failing to pay at the time and in the manner prescribed by the board, any portion of their stock remaining unpaid, or shall fail, neglect or refuse to give such additional securities as may be required of them, it shall be the duty of the directors to sell such delinquent share or shares at auction for cash to the highest bidder, after having given ten days public notice of the time and place of sale, and the proceeds to be applied in payment of said shares; and, moreover, such delinquent stockholder shall be held liable in his individual capacity for any balance remaining unpaid on said shares, and in case any excess shall arise from such sale after having paid up the delinquency and expenses of such sale, such excess shall be paid to said stockholder.

SEC. 3. That so soon as four hundred shares are subscribed for and paid, or secured to be paid, as required in the second section of this act, the company shall be competent to transact all kinds of business for which it is established.

SEC. 4. That the affairs of the company shall be managed by seven directors, all of whom shall be stockholders. to be elected as follows: A majority of the stockholders composing this Association, shall hold a meeting for the first election of directors within one month after the amount of four hundred shares of stock shall be subscribed, and on the first Monday in May in each and every year thereafter, and

choose by ballot seven directors who shall be stockholders, and each share of stock shall entitle the holder thereof to one vote, and the directors so chosen shall serve to the first Monday in May, 1851, and until others are chosen. At their first meeting after every election, they shall choose by ballot a president from their own number, and in case of the death or disability of the president thus chosen, the directors shall fill the vacancy by ballot as before, and in case of a vacancy in the board of directors, it shall be filled by the remaining directors from the stockholders for the remainder of the year, and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in the Board by this act.

SEC. 5. That it shall be lawful for said company to insure all kinds of property against loss or damage by fire or any other cause or risk, in and out of the State; to make all kinds of insurance on goods, merchandise or other property in the course of transportation, whether on land or water, or any vessel or boats wherever they may be, to lend money upon bottomry or respondentia, to cause themselves to be insured against any loss or risk they may have incurred in the course of their business, and against any maritime or other risks, upon the interest which they may have in any vessel, boat, goods, or merchandise or other property, by means of any loan or loans which they may make on mortgage, bottomry, or respondentia, and generally to do and perform all other matters and things connected with and proper to promote these objects.

SEC. 6. It shall be lawful for said company to invest all or any part of their capital stock, money, funds, or other property, in such a way as the directors shall deem best for

the safety of the capital and interest of stockholders, and may transfer, sell and dispose of any or all interest which the said company may have acquired by said investment, provided that it shall not be lawful for said corporation to use or employ any part of their capital stock, money or other funds in buying or selling goods, wares, or merchandise, nor in the purchase of real estate, except as provided in the first section of this act, nor shall the said company trade in the business of exchange brokerage, nor issue or emit any bills of credit as a circulating medium of trade or exchange, or in any manner engage in the business or operation of banking.

SEC. 7. That the president and directors shall declare such dividends of the profits of the business of the company as shall not impair nor in anywise lessen the capital stock of the same. The dividends shall be made half yearly on the first Monday in January and July, and shall be paid to the stockholders ten days thereafter, but no dividends shall be paid to any stockholder whose stock is delinquent.

SEC. 8. The transfer of stock may be made by any stockholder or his legal representative, subject to such restrictions as the board of directors shall from time to time make and establish.

SEC. 9. That all policies or contracts of insurance that may be made or entered into by the said company, may be made either under or without the seal thereof, and shall be subscribed by the president or by such other officer as may be designated for that purpose by the board of directors and attested by the secretary, and being so subscribed and attested shall be obligatory upon the said company according to the tenor, intent, and meaning of this act, and of such policies or contracts, and all such policies or contracts so made, subscribed, attested and executed, and the loans and other

business of the company may be made, conducted, and carried on without the presence of the whole of the directors, but by such committee or otherwise as the board may authorize, and the same shall be binding on the company.

SEC. 10. That the individuals named in the first section of this act, or such committee as they shall appoint, shall receive the subscriptions to the capital stock of this company, and open books for that purpose at the City of Cincinnati aforesaid, upon two weeks' notice published in at least two daily papers of said city, which books shall continue open from day to day for ten days, unless the whole amount of the capital stock shall sooner be subscribed, and shall receive all moneys paid at the time of subscribing to said stock, and hold the same until the election of the first board of directors, when they shall dispose of it as said board may direct.

SEC. 11. That the president and directors shall have power and authority to appoint a secretary, and such other officers under them as shall be necessary for transacting the business of said institution, and may allow them such salaries as they shall judge reasonable, to ordain and establish such by-laws and regulations as shall appear to them necessary for regulating and conducting the concerns of said institution, not being contrary to, or inconsistent with this act, the constitution or laws of this state, and of the United States; they shall keep full, fair and correct entries of their transactions, which shall be at all times open to the inspection of the stockholders.

SEC. 12. That should it so happen, from any cause whatsoever, that the annual election of directors should not take place in any year on the day hereinbefore mentioned for that purpose, this corporation shall not be for that reason dissolved, but such election may be lawfully held on such

other convenient day within six months thereafter as may for that purpose be fixed by the president and directors, they causing ten days' notice thereof to be given in one or more of the newspapers printed in the City of Cincinnati.

SEC. 13. That the president and directors may call a general meeting of the stockholders for any purpose relative to the affairs of the company, giving at least ten days' notice thereof in some newspaper printed in Cincinnati.

BENJAMIN F. LEITER,
Speaker of the House of Representatives.

CHARLES C. CONVERS,
March 22, 1850. *Speaker of the Senate.*

SECTIONS 3654 AND 3655.

SEC. 3654. The president or vice president and secretary of each insurance company organized under any law of this State shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of such company on the thirty-first day of December, then next preceding, exhibiting the following facts and items, and in the following form, namely:

First—The amount of the capital stock of the company, specifying the amount paid and unpaid.

Second—The property or assets held by the company, specifying:

1. The value of the real estate owned by such company, where it is situated, and the value of buildings thereon.

2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

3. The amount of cash in the hands of agents and in course of transmission.

4. The amount of loans secured by bonds and mortgages, which are the first lien on real estate, and on which there is less than one year's interest due.

5. The amount of loans on which interest has not been paid within one year.

6. The amount due the company on which judgments have been obtained, and the cash value thereof.

7. The amount of stocks in this State, the United States, of any city of this State, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

9. The amount of unpaid assessments on stock, premium notes or contingent liabilities.

10. The amount of interest due and unpaid, and the amount of interest accrued but not due.

11. The amount of premium notes or contingent liabilities on which policies are issued.

12. The number of policies in force.

13. The amount insured under all policies in force.

14. The amount of premiums received thereon.

15. The amount and a description of all other assets.

Third—The liabilities of the company, specifying:

1. The amount of losses due and unpaid.

2. The amount of claims for losses resisted by the company.

3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

4. The amount of dividends declared and due, and remaining unpaid.

5. The amount of dividends, either cash or scrip, declared but not due.

6. The amount of money borrowed, and the security given for the payment thereof.

7. The amount required for re-insurance, being in stock companies a sum equal to fifty per cent. of the whole amount of premiums on unexpired risks and policies, and in mutual companies a sum equal to fifty per cent. of the cash premiums received on unexpired risks and policies.

8. The amount of all other existing claims against the company.

Fourth—The income of the company during the preceding year, specifying:

1. The amount of cash premiums received.

2. The amount of notes or contingent assets received for premiums.

3. The amount of interest money received.

4. The amount of income received from other sources.

Fifth—The expenditure during the preceding year, specifying:

1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.

2. The amount of dividends paid during the year.

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4. The amount paid for taxes.

5. The amount of all payments and expenditures.

6. Amount of scrip dividend declared.

* * * * *

SEC. 3655. The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes which originally formed the capital, and also what proportion of such notes is still held by the company and considered capital; and every company organized under any law of this State which fails to make and deposit such statement, or to reply to any inquiry of the Superintendent, with respect to such statement, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance, to be recovered by action in the name of the State, and, on collection, paid into the State Treasury for the benefit of the State common school fund; and the Attorney General, on the request of the Superintendent of Insurance, shall institute such action against any company so delinquent, in the court of appropriate jurisdiction in Franklin County, or in the court of appropriate jurisdiction of the county in which said company is located or has its principal place of business, as he prefers.

Office Supreme Court U. S.
FILED.
APR 17 1894
JAMES H. McKENNEY,
CLERK.

(15,435.)

Supreme Court of the United States

OCTOBER TERM, 1893.
No. 1051.

THE EAGLE INSURANCE COMPANY OF CINCINNATI,
AND
JOHN K. GREEN AND SAMUEL P. POST,
PRESIDENT AND SECRETARY OF THE SAID EAGLE INSURANCE CO.,
Plaintiffs in Error,

VS.

THE STATE OF OHIO, ON THE RELATION OF W. H. KINDER, SUPERINTENDENT OF INSURANCE OF THE STATE OF OHIO,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

REPLY TO BRIEF OF PLAINTIFFS IN ERROR.

J. K. RICHARDS,
Attorney General.

COLUMBUS, OHIO.
JOURNAL-GAZETTE PRINTING HOUSE.
1894.

(15,435.)

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STATEMENT.

This case was advanced on the docket and assigned for oral argument on March 5th, last. On the 24th of February, I printed a brief, on file, and sent a copy to counsel for plaintiffs in error. Although their brief should have been filed before mine, they have had my brief a month and I have just received a copy of theirs, printed over date of March 24.

This brief contains a number of statements and arguments, unwarranted as I claim by the facts or the law, which I should be glad to discuss fully, but must be content with hurriedly adverting to.

I.

Ever since before the Insurance Department of Ohio was created, the State of Ohio, through its proper officers, had taken the position that it had the power to compel "Old Charter" insurance companies to make disclosure of their condition.

In 1868, Hon. W. H. WEST, then Attorney General, subsequently a member of the Supreme Court of Ohio, rendered the following opinion:

OFFICE OF THE ATTORNEY-GENERAL,
COLUMBUS, O., July 28, 1868.

JAMES H. GODMAN, ESQ., *Auditor of State:*

DEAR SIR: If I properly understand your verbal inquiry of the 16th inst. it is this, "Has the Legislature the constitutional power to make the provisions of the nineteenth, twentieth and twenty-first sections of the act of April 15, 1867, 'to regulate insurance companies,' applicable to and obligatory upon insurance companies incorporated prior to the adoption of the Constitution of 1851?"

I am quite clear that the legislature has such power. It can be denied only on the ground that its exercise interferes with some franchises or vested rights of the corporation, in the sense of impairing the obligation of a contract. This was the ground on which the case of *Dartmouth College* vs. *Woodward* was decided; also the case of the *Piqua Bank* vs.

Kemp. But these decisions have no application to the present inquiry from want of analogy, either in facts or principle. To do and perform the duties required by the 19th, 20th and 21st sections of the act in no manner interferes with, suspends, interrupts or impairs any franchise, liberty, right or function of such corporation, or of any officers or member thereof.

The charters of these corporations are in the nature of contracts between the corporators on the one hand and the public on the other, the terms of which the contracting parties have the right to have enforced. They are granted in consideration of certain supposed benefits to the public from the exercise of the privileges granted, and the observance of the duties and obligations imposed by their charters. The public, as a contracting party, is therefore interested in the enforcement of these duties and obligations, and have a right to be informed whether they are being observed honestly and in good faith.

But, as the management of the concerns and the exercise of the functions and the duties of the corporations are committed exclusively to the contracting parties as its right, the public can never be informed as to whether the contract is being faithfully executed unless the power to demand and compel such information exists somewhere. That power clearly exists in the legislature, which is the sovereign agent of the public, and through which alone it can have protection. Hence it has been held, that a "Statute raising a commission to visit a bank and examine its affairs, who are compelled to testify, *under a penalty*, touching its assets and business," is clearly within the constitutional powers of the legislature. *The Commonwealth* vs. *Farmers' and Mechanics' Bank*, 21 Pickering's Report, 542.

It seems that the plainest corollary from this, that if the officers of a corporation may be made to testify, under penalty, they may be made to report, under a penalty, which is only another form of furnishing to the public the desired information as to the condition of the corporation and the degree of honesty and good faith with which it is observing the corporate contract on its part. It is essential to the public protection and promotion of public justice. It in no way interferes with or impairs any right, liberty or franchise of the corporation, but rather tends to foster and enforce them; and hence, the enactment of the above named sections was clearly within the power of the legislature.

Respectfully, etc.,

W. H. WEST,

Atty. General.

In 1874, HON. JOHN LITTLE, Attorney General, gave the Superintendent of Insurance the following opinion:

ATTORNEY GENERAL'S OFFICE,
COLUMBUS, March 27, 1874.

HON. W. F. CHURCH, *Sup't Insurance*,

SIR:—You, in yours of the 24th inst. inquire whether the "Dayton Insurance Company," organized under, and by, the special act passed Feb. 8th, 1851 (O. L. Vol. 49, page 191), is in any respect amenable to the general laws regulating insurance companies, and if so, what course to pursue, in view of its refusal to report, etc.

This company being organized by special charter under the old Constitution, has rights which can not be disturbed by the legislature. In fact, "every valuable privilege given by its charter, and which conduced to an acceptance of it, and

an organization under it, is a contract which cannot be changed by the legislature," is the language of Judge McLEAN in 4th Howard. This appears to be the settled law. But any requirement of the general law which does not impair any such privilege, should, I am inclined to think, be complied with by the company. The holdings have not gone to the extent of placing such corporations outside the pale of legislation.

The company, therefore, in my opinion, is subject to any and all requirements of the general laws, obedience to which would not impair such privilege. But as the question involved is an unsettled one, in this State at least, I should think it unadvisable for the commissioner to take any steps to enforce obedience by the company, to any provision, prior to a judicial determination of the question, of course, as may be necessary to bring the matter before the Courts.

Very respectfully,

JOHN LITTLE, *Attorney General.*

In 1880, Hon. GEORGE K. NASH, then Attorney General, afterwards a Judge of the Supreme Court of Ohio, gave the then Superintendent of Insurance the following opinion:

COLUMBUS, O., January, 1880.

Hon. JOSEPH F. WRIGHT, *Sup't. of Insurance, Columbus, O.:*

SIR:—Your favor, submitting the following questions, has been received:

"What course should be pursued by the Superintendent of Insurance in case an Ohio Insurance company, whose charter antedates the constitution of 1851, fails to file the annual statement required by Sections 3654 and 3655 of the revised statutes, and refuses to permit the examinations provided for by Section 272?

"Has the status of the companies whose charters antedate the new constitution been in any manner affected; and if so, to what extent, by compliance with the law relating to insurance companies enacted since the adoption of our present constitution?"

The answer to your first question depends upon the power of the general assembly to enact a law requiring insurance corporations chartered before the adoption of the present constitution to make such reports as are contemplated in Sections 3654 and 3655, and to submit to such examination as is provided in Section 272. I am of the opinion that it has such power, provided that it is exercised in such manner as not to impair any vested right of the corporation. In this conclusion, I am sustained in an opinion given by Attorney-General West on the 28th of July, 1868, and also by an opinion given by Attorney-General Little on the 27th of March, 1874, copies of which I enclose herewith. Our Supreme Court in the case of the State ex rel., etc., vs. The Columbus Gas Light and Coke Company, 34 O. S. page 572, has said: "Where a corporation, acting under a special charter, is invested with franchises to be exercised to subserve the public interest, the terms upon which the corporation may be required to discharge its duties to the public, are subject to legislative provision and control, unless it clearly appears from the terms of its charter, that it was the intention to exempt it from such interference."

Unless the power to compel these corporations to make the reports now required by law, and to vest some officer with power to make examination into the affairs of the corporation, as is provided in Section 272, vests in the General Assembly, the public can never know whether the implied contract entered into between the state and the corporation is

being faithfully and honestly executed on the part of the corporation. This, certainly, is a right or power that the state ought to have, and which I think, it does possess.

If I am right in this conclusion, then it follows that the same penalties may be enforced against an insurance company chartered before the new constitution, which refuses to comply with the provisions of Sections 272, 3654, 3655 and others relating to the same subject, as could be enforced against a company since organized.

In answer to your second question, I will say that I am certain that no company whose charter antedates the new constitution has lost any franchise or vested right, such as the right "to invest its funds in such way as the directors shall deem best and most advantageous," by filing annual statements or by permitting the Superintendent of Insurance to examine into its affairs. I also think that any such company, by complying with these requirements in the future, will not impair or injure its vested rights. The reading of Section 3234 may possibly cause one to differ somewhat with the opinion that I have just expressed. If read aright, however, I do not think that such will be the case. I think that that section is intended to provide, and does provide, that if any corporation, created before the adoption of the new constitution, shall take any action under our present laws relating to corporations that in any manner changes or alters its corporate powers, rights and franchises, such action shall be deemed to be a consent upon the part of the corporation "to be a corporation, and to have and exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise."

The legislature, by requiring that certain things which it has a right to require, shall be done by these old corpora-

tions, and by prescribing a system of penalties in case they do not comply, cannot deprive them of their rights, and franchises, if they see fit to obey the law and not incur the penalties.

Therefore, I conclude that the General Assembly has the power to enact laws requiring insurance companies organized prior to the new constitution, to make annual reports and to submit to a supervision by the Superintendent of Insurance, and that in obeying such laws, such companies do not forfeit any of their chartered rights and franchises.

Respectfully yours,

GEORGE K. NASH,

Attorney-General.

In 1886 suit was brought by Attorney General Kohler to recover penalties from certain "Old Charter" companies for failure to report.

These opinions show conclusively that right along the State of Ohio has insisted that it had the right to compel these "Old Charter" companies to report.

II.

It does not follow because the Eagle Insurance Company must report annually to the Insurance Department of Ohio, that it must also invest its assets as prescribed in the general insurance laws. On the contrary, one object of the report is to ascertain whether the company is investing its assets in accordance with its charter. The filing of the Statement will not, under Section 3234, be deemed a waiver of any charter rights or a consent to operate under the present Constitution or the general insurance laws of the State.

The above propositions have, I insist, been conclusively determined by the Supreme Court of Ohio, whose appropriate duty it is to construe Ohio laws. In view, however, of a repetition before this Court of an argument made before the Supreme Court of Ohio, permit me to refer briefly to some of the provisions of the Ohio insurance law, pertinent in the premises.

By Section 3232, old charter corporations are to be governed not only by the laws in force at the time of their creation, but by "*the valid modifications thereof since or herein enacted.*" Section 3654 contains such valid modification, being a regulation in no way infringing on any franchise granted the corporation. It is said, that, while the mere making of a statement will not impair any of the privileges of the company, yet by sections 3637, 3638, 3639, there is a limitation on investment, and that this limitation will be enforced by the Superintendent of Insurance, if statements are required to be made. And reliance is placed on section 3661*a*, which limits the assets that may be included in a

circular to those admitted by the Superintendent of Insurance in the annual reports.

It will be time enough to object to section 3637 *as infringing upon the charter rights of this company when an attempt is made to enforce the provisions of this section.* An examination of 3640 will show that 3637 *et seq.* is not designed to apply to old charter companies; and besides there is an express exemption in the charter from such control, the choice of investment being left to the directors. Section 3661*a* restricts the items of value which may be advertised as assets by any company to those "of a class or character admitted by superintendent of insurance in the annual report." Section 3656 provides that a foreign company cannot do business in this state "unless the entire capital stock of the company is fully paid up and invested as required by the laws of the state where it was organized." Section 3661 requires foreign companies to file an annual statement, the same as domestic companies, yet it has never been contended that because of this requirement foreign companies must invest their capital as provided in section 3637. *From the statement filed by the company, the Superintendent of Insurance may determine among other things whether the capital of the company is invested in accordance with the law of its creation, the law applicable to the company; in the case of a foreign company, this is the law of another state; in the case of an old charter, the law of its charter.*

The argument is made, that the insurance laws now existing form a consistent whole, that if one section applies, all must apply, and contra, if all do not apply, no one applies. This is to beg the question. Certainly, all do not apply, but Section 3234 recognizes that *some* may apply, to-wit, certain specified sections and certain police regula-

tions, and counsel on the other side admit, that Section 272 is a police regulation which *does* apply. This is to give away his case. There are sections which do apply, and sections which do not apply. The sections which do apply, are proper regulations which do not impair any rights under the charter. Take Sections 3664 and 3665, providing that any fire insurance policy issued on the cash plan may be cancelled, and the unearned premium deducting customary short rates returned. Will anybody contend that this does not apply to every fire insurance company doing business in this State?

Counsel admit that the company is subject to Section 272; but the company has refused to permit an examination, claiming that under its charter it is exempt from the provisions of this section. The Superintendent has been obliged to arrest the officers of certain old charter companies in Toledo, to compel them to comply with Section 272. They all claim that they are exempt from all regulations looking to reports or examinations or the public disclosure of their condition. Section 272 is based on Section 3654. It reads: "The Superintendent, *when he has reason to suspect the correctness of any statement of an insurance company doing business in this State, whether incorporated in this State or not*, or that its affairs are in an unsound condition," shall make an examination; and further on in the section it is provided that he shall make an annual examination of every life insurance company. The result of the examination is to be published. (Sec. 273.) It is from the statement, the Superintendent ascertains whether the company is in an unsound condition.

III.

In illustration of the interest the State of Ohio has in compelling "Old Charter" companies to report, and the wisdom of the decision of the Supreme Court of Ohio in this case, I direct the Court's attention to the following circular issued by the Insurance Department of Ohio in March, 1893, in which are set forth the names of the so-called "Old Charter" companies which went out of business and into the hands of receivers directly after the decision of this case:

STATE OF OHIO,
INSURANCE DEPARTMENT,
OFFICE OF SUPERINTENDENT.—COLUMBUS.

The following companies, known as "Old Charter Companies," are now in the hands of receivers, and have no authority to transact business in this State. Any person or persons issuing or causing to be issued policies in any of the companies named herein will be doing so in violation of the laws of Ohio, and liable to prosecution:

The Reserve Insurance Co., of Cleveland, chartered as the Mutual Insurance Co., of Toledo.

The Sandusky Insurance Co., of Sandusky, O.

The Crescent Insurance Co., of Cleveland, chartered as the Stark County Mutual Insurance Co., of Canton, Ohio.

The Washington Union Insurance Co., of Cleveland, O.

The Western Insurance Co., chartered as the Canal Insurance Co., of Cincinnati, O.

The Citizens' Insurance Co., of Cincinnati, chartered as the Clermont County Fire, Marine & Life Ins. Co.

The Central Ohio Insurance Co., of Toledo, chartered as the Central Ohio Insurance Co., of Licking County.

The Home Insurance Co., chartered as the Seneca County Mutual Insurance Co., Tiffin, O.

The Washington Fire Insurance Co., of Marietta, chartered as the Washington County Mutual Fire Ins. Co., Marietta, O.

The Eclipse Insurance Co., of Cleveland, Ohio.

The Trumbull Fire Insurance Co., of Warren, O., operated as the Trumbull Fire Insurance Co., of Cleveland.

The Erie Insurance Co., of Sandusky, Ohio.

W. M. HAHN, *Superintendent of Insurance.*

Respectfully submitted,

J. K. RICHARDS,

Attorney General of Ohio.

April 16, 1894.